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Supreme Court of the United States

OCTOBER TERM 1941

No. 928

IN THE MATTER

of

ARMAND SCHMOLL, INC.,

Petitioner and Appellant Below,

v.

THE FEDERAL RESERVE BANK OF NEW YORK,

Respondent and Appellee Below.

PETITION AND SUPPORTING BRIEF FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK FOR NEW YORK COUNTY

HERSEY EGGINTON
of Larkin, Rathbone & Perry,
Counsel for Petitioner,
70 Broadway,
New York, N. Y.

HERSEY EGGINTON,
GEORGE D. MUMFORD,
of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK FOR NEW YORK COUNTY

TO THE HONORABLE HARLAN FISKE STONE, CHIEF JUSTICE OF THE UNITED STATES AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully submits its petition for a writ of Certiorari to review the decision of the Court of Appeals of the State of New York, made on remittitur the judgment of the Supreme Court, affirming the decision of the Appellate Division of the Supreme Court for the First Department, which latter affirmed the resettled order of Mr. Justice Rosenman at Special Term for New York County, in this case, dismissing the Petition herein for an order in the nature of an order of mandamus against the Federal Reserve Bank of New York, and granting its,

the Respondent's, motion to dismiss as a matter of law only viz., upon the ground that the Supreme Court of the State of New York had no jurisdiction of the subject of the proceeding, and specifically excepting any exercise of discretion.

I

Summary statement of the matter involved.

This is a proceeding brought by Petitioner under Article 78, Sections 1288 and 1289, of the New York Civil Practice Act to obtain an order directing the Respondent, The Federal Reserve Bank of New York, a federal statutory agency, resident in, and subject to process in the courts of, New York, to perform a mandatory ministerial duty enjoined upon it by Section 522 (c) of the Tariff Act of 1930, Ch. 497 (46 Stat. 739), U. S. Code, Title 31, Section 372; viz., to determine and certify *nunc pro tunc* to the Secretary of the Treasury the buying rates in the New York market for cable transfers payable in Brazilian milreis on three specified dates, in the manner prescribed by that Section.

This Petitioner seeks a review of the decision of the Court of Appeals of the State of New York, made, on its remittitur, the order and judgment of the New York Supreme Court, affirming the decision of the latter Court, and also declaring it to be its own judgment, that, solely as matter of law, the Supreme Court of the State of New York was without jurisdiction to issue an order in the nature of mandamus running against the Federal Reserve Bank of New York to compel it to determine and certify such buying rates actually prevailing in the New York market for cable transfers of Brazilian milreis, in compliance with the mandatory and ministerial duty imposed upon that Bank by said Section 522 (c).

In January and February 1936, the Petitioner imported three lots of cattle hides from Brazil (R.* 5; Pet. par. 3),

which were subject to an *ad valorem* duty of 10% under Paragraph 1530 (a) of the Tariff Act of 1930. In accordance with Section 488 of that Act, they were appraised in Brazilian milreis as of the dates of exportation from Brazil, December 19, 1935, January 15 and February 8, 1936, at the respective sums of 166,214$400, 532,315$690 and 1,187,615$350 (R. 6; Pet. par. 5). Under that Tariff Act it was the duty of the Collector of Customs of the Port of New York, prior to liquidating the duties on the Petitioner's hides, to convert their appraised values from Brazilian milreis into United States currency, and in so doing to use the rates of exchange determined in the manner prescribed by Section 522 (c) of the Tariff Act of 1930. By that Section, when the value proclaimed quarterly by the Secretary of the Treasury "* * * varies 5 per centum or more from a value measured by the buying rate in the New York market at noon on the day of exportation, conversion shall be made at a value measured by such buying rate. * * * For the purposes of this subdivision such buying rate shall be the buying rate for cable transfers payable in the foreign currency so to be converted; and shall be determined by the Federal Reserve Bank of New York and certified daily to the Secretary of the Treasury, who shall make it public at such times and to such extent as he deems necessary. * * *" (Section 522, subdivision (c)).

On the dates in question there was a variance of more than 5% from the proclaimed values and, in liquidating the duties on Petitioner's hides, the Collector converted their appraised milreis value into United States currency at the rates certified by the Respondent-Appellee (R. 8; Pet. par. 10). As shown by the Petition (R. 7-11, 14-15) and the supporting affidavits (R. 17, 18, 19) the Respondent, purporting to comply with Section 522 (c), certified, as the buying rates for cable transfers payable in Brazilian mil-

* Whenever "R", followed by numbers, appears herein it means the page number of the Record herein.

reis, amounts more than 40% in excess of the actual rates, not only on the days in question but throughout the months of December, 1935, January and February, 1936, at the same time admitting that they were not the actual rates and asserting that there were no New York market buying rates for such cable transfers by characterizing each rate it certified as: "Nominal rate. Firm rate not available" (R. 7-8; Pet. par. 9).

The Petition alleges that, as established by the affidavit of an officer of one of the largest New York trust companies (R. 9, 17, 18), an actual market existed in New York during the three months in which there were actual transactions in cable transfers payable in Brazilian milreis and in which firm quotations of the buying rates for such cable transfers were at all times obtainable; that the actual buying rates in the New York market on the three days in question were $0.0555, $0.0560 and $0.0585 per milreis, respectively; that the lowest market buying rate at noon on any day during these three months was $0.0550 and the highest was $0.0585 per milreis (R. 8, 9, 10). Schedules B and C (R. 16, 17) and Exhibit A to affidavit (R. 18-19, fol. 27) giving the actual rates, show stability and lack of fluctuation in them.

Respondent was fully informed of the actual market for such cable transfers, receiving daily reports from its member banks in New York of rates of milreis cable transfers (R. 10, 18, 19); and was required by law to keep "currently informed" as to all foreign exchange transactions and transfers of credits in its district. Every person having a principal place of business in Respondent's district who engaged in such transactions and transfers, with minor exceptions, was required by law to report "complete information relative thereto" to the Respondent. (See Executive Order No. 6560 of January 15, 1934, regulating transactions in foreign exchange, transfers of credit and the export of coin and currency, issued pursuant to Section 5 (b) of the Act of October 16, 1917 (40 Stat. 411), as amended by Section 2

of the Emergency Banking Act of March 9, 1933 (48 Stat. 1), and Regulations of the Secretary of the Treasury issued under said Executive Order on November 12, 1934.)

The actual market rates for the three months never exceeded $0.0585 per milreis, but the lowest rate certified by Respondent during December, 1935, and January and February, 1936, was $0.08250 and the highest was $0.084700 (R. 9, 14, 15). The rates unlawfully certified by Respondent exceeded the actual market rates by an average of more than two and three-quarters (2¾) cents, or some 50% higher than the actual market rates (R. 15, 16).

The Petition shows that the use of the rates actually certified will cause the assessment of duties on Petitioner's hides to exceed the actual duties imposable by law by approximately 40% (R. 12; Pet. par. 15); and that there is no way in which Respondent can be forced to certify correct and lawful rates, other than by an order in the nature of mandamus, which would finally determine the rights of the parties (R. 12; Pet. par. 16).

Petitioner on January 29, 1939 duly demanded of Respondent the lawful action which was refused (R. 12, 14). The present proceedings were thereafter, and within the statutory period of four months after such demand and refusal, commenced to compel Respondent to comply with Section 522 (c) (R. 13, 14, 20; see Section 1286, *infra,* p. 10). Respondent, not answering and so admitting the material allegations of the Petition, moved under section 1293 of the Civil Practice Act of the State of New York to dismiss the petition as matter of law on four objections in point of law (R. 19, 20), the principal and pertinent one and that upon which the decisions below are based being that; "(1) this Court (Supreme of New York) has no jurisdiction of the subject of the proceeding; * * *".

The Respondent's motion for dismissal of the Petition was heard by Mr. Justice Rosenman at the Special Term of the Supreme Court of New York who granted it as above for lack of jurisdiction, and by a resettled order (R. 2-4),

specifically excluded any exercise of discretion (R. 4). The other objections presented by Respondent were not passed upon (R. 29) and the opinion of Justice Rosenman shows the narrow and exclusive ground for his decision (R. 27, 28, 29). Justice Rosenman's decision was upon the theory that Petitioner sought to command the *manner* of performance (actually prescribed by the statute) of a federal duty by a federal agent in the administration of the customs laws, and that a state court possessed no such jurisdiction because this Court had so decided in *M'Clung* v. *Silliman* (6 Wheat. 598) by declaring "* * * that the official conduct of an officer or agent of the United States Government can only be controlled by the power that created him". And he also says that a state court may not "* * * issue an order in the nature of mandamus to an officer or agency of the federal government in relation to the exercise of a federal governmental function by such officer or agency". And he adds that the question is: "It is whether the manner of performance of a specific federal government statutory function by a federal statutory agency can be the subject of a decree of a state court."

The Special Term's exclusive holding of a lack of jurisdiction of the state court to prevent plain, unwarranted violation by Respondent of the federal statute, without consideration of the other objections, was unanimously affirmed without opinion by the Appellate Division of the First Department, which, however granted to Petitioner leave to appeal to the Court of Appeals. The Court of Appeals affirmed the dismissal on the jurisdictional ground, Chief Judge Lehman writing for the majority, all concurring except Conway, J., who dissented in a comprehensive opinion the effectiveness of which makes untenable, as matter of sound reasoning, the majority opinion. (*Armand Schmoll, Inc.* v. *Federal Reserve Bank,* 286 N. Y. 503, 37 N. E. (2nd) 225; R. 37-57.)

To the formal statement of reasons given by Justice Rosenman, Chief Judge Lehman adds the pure assumption

of exclusive power in the federal government, although not in terms given by the Tariff Act, by saying: "No case has been cited which holds that a State Court may go outside that field (that 'of its alleged jurisdiction') and control the manner in which a Federal agency performs or attempts to perform its functions and duties under the Tariff Act or other Federal statute where the Federal government has exclusive jurisdiction. Assumption of such power would hamper orderly government and ignore the division of the fields of government of State and nation created by the Constitution" (286 N. Y. 503, 509; R. 37).

II

This Court's jurisdiction to review.

The Judicial Code by Section 237 (b) (U. S. C. Title 28, Section 344 (b)) definitely provides for the review by this Court of the final judgment rendered in this matter by the Courts of New York. There are involved questions of the construction of the Tariff Act of 1930, as construed by the courts below, and of the validity under the State Constitution and local law of the Petitioner's substantive right to an order in the nature of mandamus, and of the forms of relief against the Respondent, and of the title, right, privilege and immunities of the Petitioner under the Federal Tariff Act of 1930 and the Constitution of the United States. These jurisdictional matters and rights are confirmed by Article VI, Clause 2, of the Federal Constitution providing that "the Laws of the United States" (including the Tariff Act of 1930) * * * "shall be * * * the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding." The courts below have decided these federal questions of substance in a way probably not in accord with the applicable decisions of this Court.

The Court of Appeals' decision is dated October 16, 1941, and the remittitur bears date October 17, 1941 (R. 52-3), and the order of the Supreme Court for New York County making the order of the Court of Appeals the order of that Court was entered on October 21, 1941 (R. 53-54). The time within which to petition to the Supreme Court of the United States for a writ of certiorari to the Court of Appeals or to the Supreme Court of the State of New York would have expired on January 21, 1942, but an order extending the Petitioner's time within which to apply for said writ of certiorari to February 3, 1942, was granted by Mr. Justice Jackson on January 16, 1942, and entered in the office of the Clerk of this Court (R. 54), and a copy served on the Respondent on January 21, 1942. An order further extending the Petitioner's time within which to apply for said writ of certiorari to February 7, 1942, was granted by Mr. Justice Jackson on January 29, 1942 and entered in the office of the Clerk of this Court (R. 55).

III

Statutes involved.

This case involves the interpretation and enforcement of Section 522 of the Tariff Act of 1930, Ch. 497 (46 Stat. 739) U. S. Code, Title 31, Section 372; R. 6, 7). The relevant provisions of this Act are contained in Section 522 (c). Under that Act, for the purpose of the assessment and collection of duties upon merchandise imported into the United States, wherever it is necessary to convert foreign currency of the United States under the conditions provided by Section 522 (c), conversion of such foreign currency shall be made at a value measured by the buying rate in the New York market, at noon on the date of exportation, for cable transfers payable in the foreign currency so to be converted. Section 522 (c) meticulously prescribes the method in which such determination shall be made. By that Section

the Federal Reserve Bank of New York is authorized and required to determine in the manner therein prescribed, and to certify daily to the Secretary of the Treasury, the buying rate for such cable transfers.

Section 522 (c) reads as follows:

> "(c) Market Rate When No Proclamation.—If no such value has been proclaimed, or if the value so proclaimed varies by 5 per centum or more from a value measured by the buying rate on the New York market at noon on the day of exportation, conversion shall be made at a value measured by such buying rate. If the date of exportation falls upon a Sunday or holiday, then the buying rate at noon on the last preceding business day shall be used. For the purposes of this subdivision such buying rate shall be the buying rate for the cable transfers payable in the foreign currency so to be converted; and shall be determined by the Federal Reserve Bank of New York and certified daily to the Secretary of the Treasury, who shall make it public at such times and to such extent as he deems necessary. In ascertaining such buying rate such Federal Reserve bank may in its discretion (1) take into consideration the last ascertainable transactions and quotations, whether direct or through exchange of other currencies, and (2) if there is no market buying rate for such cable transfers, calculate such rate from actual transactions and quotations in demand or time bills of exchange."

Title 12, U. S. C., Section 341, is also involved, which provides that the Federal Reserve Bank of New York "shall have power— * * * to sue and be sued, complain and defend, in any court of law or equity". That this includes state courts is confirmed by Section 632, of 12 U. S. C., which permits but does not require the removal to the federal courts of suits to which a Federal Reserve Bank is a party and provides that no attachment or execution shall issue against the respondent before final judgment in any suit, in any state, county, municipal or United States court (Appendix, p. 30).

Sections 1283, 1284, 1285, 1286, 1288, 1289, 1293, 1295, 1296, 1300 and 1306 of *Article* 78 (L. 1937, Ch. 526) of the New York Civil Practice Act are also involved, as confirming and granting original jurisdiction to the Supreme Court of the State of New York to entertain proceedings in the nature of mandamus as part of the ordinary civil remedies in the courts of the state. The relevant portions of these sections are set out in the Appendix to the Petition at pages 27-29, *infra.*

Section 1283 of Article 78 provides that "the classifications, and writs and orders of certiorari to review, mandamus and prohibition are hereby abolished. The relief heretofore obtained by such writs or orders shall hereafter be obtained as provided in this article."

Section 1284, *inter alia,* provides (1) "The expression 'body or officer' includes every court, tribunal board, corporation, officer or other person, or aggregation of persons, whose action may be affected by the proceeding under this article"; * * * (3). "The expression 'to compel performance of a duty specifically enjoined by law' refers to all other relief heretofore available in a mandmus proceeding"; and (4) that "nothing in this article shall be deemed to continue or establish distinct remedies."

Section 1286 provides, as to "Limitations of Time," that "a proceeding under this article * * * to compel performance of a duty specifically enjoined by law, must be instituted by service of the petition and accompanying papers, as prescribed in Section twelve hundred and eighty-nine of this article within four months * * * after the respondent's refusal, upon the demand of the petitioner or the person whom he represents, to perform his duty * * *."

Section 1295 provides: "Upon the return day of the application, if no triable issue of fact is duly raised by the pleadings and accompanying papers, the court shall forthwith render such final order as the case requires * * *."

Section 1300 provides that "the court shall render a final order granting the petitioner the relief to which it deems he is entitled, or dismissing the proceeding, either on the merits or with leave to renew."

IV

The questions presented.

The questions fundamentally involved are as follows:

(1) Did the Courts below err in holding that Petitioner sought to direct the *manner* of performance by a federal agency of its statutory duties when the statute (Section 522 (c) of the Tariff Act of 1930) itself prescribed the manner of performance and that consisted of merely reporting the rates for cable transfers in the New York market, which market registered automatically those rates, with the prescribed duty and manner of performance being and becoming purely mandatory and non-discretionary?

(2) Did the Courts below err in holding that the Supreme Court of New York was without jurisdiction to restrain Respondent from violating Section 522 (c) of the federal Tariff Act or to compel it to comply with that Act when the Tariff Act did not exclude State power to act; and further err, with this held on the ground that this Court had so decided in *McClung* v. *Silliman,* 6 Wheaton 598?

(3) Did the Courts below err in holding that the incorrect and false reporting of the buying rates in the New York market for cable transfers by the Respondent, as a federal agent, in violation of Section 522 (c) of the federal Tariff Act of 1930, was a political and sovereign act of the federal government which the Supreme Court of New York was without jurisdiction to prevent or correct by mandamus or other remedy?

(4) Is the Supreme Court of New York State, acting under Article 78 of the New York Civil Practice Act, without jurisdiction, solely because it is a State court, to compel

the Respondent as a federal agent to perform the mandatory, ministerial duties imposed upon it by Section 522 (c) of the Tariff Act of 1930?

(5) Did the Courts below err in failing to hold that the Congress, by expressly investing Respondent with the power to "sue and be sued in any court of law or equity," withdrew, and intended to withdraw, from Respondent any immunity as a federal agent, from the jurisdiction of State Courts and intended to apply to it any of their usual civil remedies and process to compel Respondent to comply with Section 522 (c) of the Tariff Act of 1930?

(6) Did Congress by the Tariff Act of 1930 expressly or by necessary implication confer on the federal Collector or the Customs Courts having power to review his decisions or on any other federal agency, exclusive jurisdiction to enforce or to fail to enforce performance by the Respondent, The Federal Reserve Bank of New York, of the mandatory, ministerial duties imposed on it by Section 522 (c), or invest the Collector or any other federal agency with any jurisdiction or power whatever over Respondent to compel such performance?

(7) In the absence of any such statutory, exclusive jurisdiction conferred upon the federal Collector or the Customs Courts or any other federal agency, or of any adequate statutory remedy given to persons whose vested rights under Section 522 (c) have been violated by Respondent, has the Supreme Court of the State of New York, in proceedings brought under Sections 1288 and 1289 of Article 78 of the New York Civil Practice Act and under the decisions of the New York Court of Appeals in mandamus or similar proceedings, jurisdiction to compel Respondent to perform its mandatory, ministerial duties imposed upon it by Section 522 (c), or to restrain and otherwise correct palpable violations thereof?

(8) Did the Courts below err in holding, in effect, that the use in the instant case of the local New York substantive statutory proceedings and its ordinary remedies in a civil suit in the nature of mandamus under Article 78 of the New York Civil Practice Act, to compel by order the Respondent,—a federal governmental statutory agent resident in New York, subject "to sue and be sued" in the Supreme Court of the State of New York, and designated by Congress as such governmental agency for the sole and express purpose of effectuating the mandatory provisions of Section 522 (c) of the Tariff Act of 1930,—to comply with the terms of such section and to perform its mandatory, ministerial duties as prescribed therein, constitutes such a grave limitation by the New York Legislature and Supreme Court upon such federal agent's powers and ability to perform its mandatory, statutory duties and functions as not to have been intended by the Congress to have been included in its general statutory withdrawal of such governmental federal agent's immunity from suit under the "sue and be sued" provisions of Title 12, U. S. C. Section 341,—and so imposes an implied limitation upon the general withdrawal by Congress from the Respondent of any immunity from such suit and process?

V

The reasons relied upon for the allowance of certiorari.

The grounds which call for the granting of the Writ of Certiorari and of the relief sought by Petitioner are most adequately and competently set forth by Judge Conway in his careful and full dissenting opinion (286 N. Y. 503, at 509-525; R. 37-51). Those grounds there stated are hereby adopted and incorporated in this Petition as if fully set forth herein and are sufficient in themselves. However, in addition, Petitioner briefly states the reasons, and in con-

travention of those advanced by Chief Judge Lehman (286 N. Y. 506-509), in the following fashion:

Petitioner never sought to command the *manner* of performance of the duty of the federal agent, as declared by the majority below (286 N. Y. 508-509; R. 34, 37). That "manner" or rather method of performance is carefully prescribed by section 522 (c) of the Tariff Act itself, and Petitioner sought only to prevent the palpably unlawful act of Respondent in violating its mandatory, ministerial, statutory duty, and thus to compel compliance with the federal act. There is lack of jurisdiction in the State Court only in the event that its judicial order would gravely interfere with the performance of a governmental function or would impair the authority or efficiency of the federal agent. (*F. H. A.* v. *Burr,* 309 U. S. 242, 245, 249; *First National Bank* v. *Missouri,* 263 U. S. 640, 659; *Federal Land Bank* v. *Priddy,* 295 U. S. 229, 237; Compare *National Bank* v. *Commonwealth,* 9 Wall, 353, 361-2). Here neither objection is good for Petitioner seeks only to have Respondent perform its statutory duty and keep within the law rather than to permit it to clearly and intentionally violate it.

There is no language, either express or necessarily implied, in Section 522 (c) or in any other provision of the Tariff Act of 1930 by "* * * which the state government is excluded" (286 N. Y. at 506; R. 35); and *McClung* v. *Silliman* (6 Wheat. 598) does not hold "* * * that the state court is without power to give such directions to a federal officer acting under a federal statute * * *". The statutory duty to report the actual buying rates prevailing in the New York cable transfer market, even if misnamed a "governmental function", does not involve in any wise a political or sovereign act of the federal government. The rates are actually made by the New York market, by the transactions had daily between buyers and sellers of the exchange. No act of the sovereign makes them. Congress has required that what actually happens in the market be in effect automatically reported. There is no act of the sovereign in this and on the part of the federal

agent there is only a ministerial duty. *Kendall* v. *United States,* 12 Peters 524, at pp. 609-610; *Philadelphia* v. *Stimson,* 223 U. S. 605, 619, 620; *Lessin* v. *Board of Education,* 247 N. Y. 503, 510, 511; *People ex rel. Equitable Life Ass. Soc.* v. *Pierce,* 187 App. Div. 437, aff'd 229 N. Y. 514. When the sovereign acts by lowering, through a law of Congress, the rate of duty or the President under the flexible tariff law lowers a specific duty, a citizen in a particular industry may be severely injured or his business wholly destroyed. This, however, is without redress to him, for the sovereign or people is acting in its political capacity. This did not happen to the Petitioner, for its injury is due to an unlawful act, a failure by the federal agent to comply with the mandatory prescription of the federal law.

There is here no basis for exclusion of the State Court from administering the only effective remedy by mandamus to enforce the federal act. There is concurrent jurisdiction in the State to enforce federal laws by any appropriate form of action or civil remedy provided by the state laws, unless and until Congress by clear direction vests exclusive jurisdiction in federal authorities. *Claflin* v. *Houseman,* 93 U. S. 130, 136-7; *Second Employers Liability Cases,* 223 U. S. 1, 55-59; *Minn. & St. Louis R. R.* v. *Bombolis,* 241 U. S. 211, 221-2; *St. Louis B. & M. Ry. Co.* v. *Taylor,* 266 U. S. 200, 207-8; *Galveston etc. Ry. Co.* v. *Wallace,* 223 U. S. 481, 490; *Panama R. R. Co.* v. *Vasquez,* 271 U. S. 557; aff'g 239 N. Y. 590; *Hines* v. *Lowrey,* 305 U. S. 85; *People* v. *Welch,* 141 N. Y. 266, 272-3, 275.

In the *Taylor* case, 266 U. S. 200, Mr. Justice Brandeis said at page 208:

> "The origin of the right does not affect the manner of administering the remedy. The grant of concurrent jurisdiction implies that, in the first instance, the plaintiff shall have the choice of the Court. As an incident, he is entitled to whatever remedial advantage inheres in the particular forum. *Minneapolis & St. Louis, R. R. Co.* v. *Bombolis,* 241 U. S. 211, 221. * * *"

State courts, with the support of this Court, have been continually furnishing relief to suitors against federal agents for their violations of, or departures from, federal statutes. So far as state courts are concerned, the Courts below erroneously held that the only relief they cannot grant is to prevent plain violation of or to enforce compliance with a federal statute imposing a mandatory and ministerial duty. However, the federal courts of the District of Columbia may and do grant such specific relief merely because Congress has vested in them the same judicial power as exists in the State of Maryland under its Constitution and laws. *Kendall* v. *United States,* 12 Peters 524. That, of course, includes mandamus and New York must enjoy the same rights and power, unless clearly excluded by act of Congress (Conway, J., 286 N. Y. at 523, 524; R. 50, 51).

The case of *McClung* v. *Silliman,* upon the alleged authority of which the decisions below rest, does not hold that state courts are without authority to issue mandamus to federal agents. There the state court, on the Government's preliminary objection that there was no such jurisdiction, held to the contrary. On the later trial, on a stipulation of facts, it decided against the applicant on the merits. This Court affirmed the Ohio court's judgment on the merits, thereby upholding the latter's jurisdiction.

What the *McClung* case actually decided is challenged, of course. What the Court does by its mandate and judgment, rather than its opinion, must determine the true holding of the case. At the foot of the opinion the Supreme Court declares:

> "Judgment. This cause came on to be heard, on the transcript of the record of the Supreme Court of the State of Ohio, for Muskingum County, and was argued by counsel. On consideration whereof, it is *Adjudged and Ordered,* that the judgment of the said Supreme Court of the State of Ohio, be, and the same is hereby affirmed, with costs; it being the opinion

> of this Court, that the said Supreme Court of the State of Ohio, had no authority to issue mandamus in this case."

If it had intended to hold flatly that no state court has any power to issue an order or judgment against a federal agency, because only the creator may control the created, this Court would in terms have said so. Instead of dismissing for lack of jurisdiction, the mandate affirmed the Ohio court's judgment and the added language of lack of authority in the Ohio court "to issue a mandamus in this case", simply refers to the lack of merits warranting no mandamus "in this case". The full meaning of the phrasing of the Court's mandate, by which the holding in the *McClung* case must be determined, which directed an *affirmance* of the judgment of the Ohio Supreme Court dismissing on the merits McClung's motion for a mandamus, but adding "it being the *opinion* of this Court that the said Supreme Court of the State of Ohio, had no *authority* to issue a mandamus in this *case*" (italics supplied), is highly important. (See review of this case in dissenting opinion of Conway, J. (286 N. Y. at pp. 514-518; R. 42-45)). The meaning of such phrasing was early explained by Chief Justice Marshall in *Marbury* v. *Madison* (1 Cranch 137, at p. 172) where he said of another mandamus case:

> "When the subject was brought before the Court, the decision was, not that a mandamus would not lie to the head of a department directing him to perform an act, enjoined by law in the performance of which an individual had a vested interest; but that a *mandamus* ought not to issue in that case; the decision necessarily to be made if the report of the Commissioners did not confer on the applicant a legal right."

The McClung mandate necessarily means that the refusal of mandamus was for lack of merit and not for lack of jurisdiction. The affirmance of the Ohio court's judgment —a dismissal on the merits—is conclusive as to that Court's jurisdiction and means that, if on the merits the mandamus

had been awarded, it would have been affirmed and sustained by this Court. This has been confirmed in a later state court case, where, instead of dismissing for lack of jurisdiction, this Court reversed but remanded proceedings to the state court, thereby implying and affirming jurisdiction (*Northern Pac. Ry. Co.* v. *North Dakota,* 250 U. S. 135, 152.)

Moreover, if, as asserted by the Court of Appeals, there were any rule of exclusion laid down in the *McClung* case (286 N. Y. 506-509; R. 34-37), based on the claim of warring sovereignties rejected in *Claflin* v. *Houseman,* 93 U. S. 136-7, that the federal jurisdiction excludes state interference, such rule must be reciprocal and then state jurisdiction would preclude interference by federal authorities or courts with state duties and officers.

The Government, in its Brief in the Court of Appeals, at page 14, concedes this rule of reciprocity by saying: "Since the federal government and the state government represent separate jurisdictions, it is only natural that the governmental functions of the one are not subject to the control of the courts of the other, except for the limited control which federal courts may exercise to enforce the Constitution and statutes of the United States as the supreme law of the land." This Court has, however, on the contrary decided that federal courts might issue mandamus compelling state or county officers to levy and collect taxes under state laws the doing of which the state courts had theretofore enjoined. (*Riggs* v. *Johnson County* (1867), 6 Wall. 166; *Supervisors* v. *United States,* 4 Wall. 435; *Mobile* v. *Watson,* 116 U. S. 289; *Macon County* v. *Huidekoper,* 134 U. S. 332; *Arkansas* v. *St. Louis S. F. Ry. Co.,* 269 U. S. 172.) Of course, the relief sought by McClung, if granted, would have interfered with a matter committed by the statute exclusively to a federal officer invested with *quasi-judicial* powers (*Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316, 324) or required him to violate the law (*United States* v. *Stone,* 2 Wall. 525, 535; *Hoofnagle* v. *Anderson,*

7 Wheat. 214, 215; *Simmons* v. *Wagner,* 101 U. S. 260; *Smelting Co.* v. *Kemp,* 104 U. S. 636, 647; *Moore* v. *Robbins,* 96 U. S. 530); and so on the merits the decision was proper and supportable (286 N. Y. at 517; R. 44). As pointed out by Judge Conway (286 N. Y. at 517; R. 44): "The Register had no power or duty to do the act which McClung sought to force him to perform. (*Simmons* v. *Wagner,* 101 U. S. 260, 261, 262; *Borax Consolidated, Ltd.* v. *Los Angeles,* 296 U. S. 10, 17, 18.) For that reason no court, State or federal, had power to grant the relief sought in the *McClung* case."

This Court in the *McClung* case, on *his* writ of error, had no jurisdiction of the federal question of the claimed immunity of the Register, Silliman, as a federal officer, from the jurisdiction of the Ohio court, and the part of Justice Johnson's opinion relating thereto was, therefore, dictum and of no binding authority. No federal question is raised under the 25th section of the Judiciary Act and this Court is without appellate jurisdiction, unless the federal act alleged to create rights in plaintiff in error is shown by the record *to be applicable and to have been applied.* (*Miller* v. *Nichols* (1820), 4 Wheat. 311, 315; *William* v. *Norris,* 12 Wheat. 117, 124; *Hickie* v. *Starke,* 1 Pet. 98, 99; *Crowell* v. *Randell,* 10 Pet. 368, 391, 394-5; *Fisher's Lessee* v. *Cockerell,* 5 Pet. 248, 258.) Only the federal question of the construction of the Act of May 10, 1800 (2 Stat. 73), as to the validity of the prior sales of fractions separated by the navigable river Muskingum was raised by *McClung's* writ of error. (See Record in this Court, in *McClung* v. *Silliman,* 6 Wheat. 598 and, *infra,* pp. 57-60). McClung's writ gave this Court only appellate jurisdiction to construe the act as to the validity of those sales, but did not give it jurisdiction to pass upon Silliman's claimed immunity, as a federal officer, from the Ohio court's jurisdiction. No such federal question was before this Court on McClung's writ of error.

The Supreme Court of New York, under its Constitution and laws, always had general jurisdiction at law and in

equity, including power to issue mandamus or an order in the nature of mandamus, which is confirmed by the New York local law known as (new) Article 78 of the Civil Practice Act, and the mandamus decisions of the New York Court of Appeals, made applicable by the decision of this Court. (*Erie R. R. Co.* v. *Tompkins,* 304 U. S. 64.)

Article 78 contains no limitation upon a proceeding thereunder against a resident officer, agency or instrumentality of the United States to compel performance of a duty imposed upon it by law, under an Act of Congress. As Clause 2 of Article Sixth of the Constitution of the United States provides that acts of Congress "shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding" (See *Hines* v. *Lowrey,* 305 U. S. 85, at p. 91), it follows that the performance of a duty specifically enjoined by Act of Congress upon a resident federal agency subject to suit in the Supreme Court of the State of New York, may be compelled under Article 78 of the New York Civil Practice Act. The Respondent is admitted to be such an agency. Congress has specifically provided (Title 12, U. S. C. A. § 341) that a Federal Reserve Bank shall have power— "* * * Fourth. To sue and be sued, complain and defend in any court of law or equity,".

In New York State, by the decisions of the Court of Appeals, governmental agencies performing a governmental duty not judicial in its nature are not immune from liability for their torts or from liability in mandamus. *Baird* v. *Supervisors Kings County,* 138 N. Y. 95, 115, 116 (mandamus); *Matter of Lewis* v. *Carter, et al., Individually and as the Board of Parole for State Prisons,* 220 N. Y. 8, 18 (mandamus); *People ex rel. Equitable Assurance Soc.* v. *Pierce,* 187 App. Div. 437, aff'd 229 N. Y. 514 (mandamus); *Matter of Potts* v. *Kaplan,* 264 N. Y. 110, 117 (mandamus); *People ex rel. Hilliker* v. *Pierce,* 64 Misc. 627 (mandamus); *Lessin* v. *Board of Education,* 247 N. Y. 503,

510, 511 (tort); *Herman* v. *Board of Education,* 234 N. Y. 196 (tort); *Jaked* v. *Board of Education,* 198 App. Div. 113, 118, aff'd 234 N. Y. 591 (tort). In the *Lessin* case, *supra,* Lehman, J., writing for an unanimous court, said:

> "The State has created the Board of Education as a corporate agent to discharge governmental functions. No exemption from responsibility for dereliction in the discharge of a corporate duty has been granted * * *. The Board has * * * failed to perform a duty imposed upon it by law, and liability may be predicated upon its own wrong."

Under the rule of *Erie R. R.* v. *Tompkins,* 304 U. S. 64, 78, the above decisions of the New York Court of Appeals are the equivalent of New York statutes, as setting out the local law that agencies performing a governmental duty not judicial in its nature are not immune from liability for their torts or immune from mandamus orders compelling them to perform mandatory, ministerial duties, and so are subject to proceedings under Article 78 of the Civil Practice Act.

In *People ex rel. Solomon* v. *Brotherhood of Painters,* 218 N. Y. 115, the Court of Appeals, by Seabury, J., said:

> "Mandamus was originally regarded as a prerogative writ. In modern times it has been somewhat assimilated to ordinary remedies. The power of the courts to grant a remedy by means of this writ is derived from the common law and from statutory enactments. The common law right to issue the writ is limited to the enforcement of some duty prescribed by law *as against persons and corporations within the jurisdiction.*" (Italics ours.)

The Tariff Act of 1930 vests no power in any of the federal agencies, and especially not in the customs authorities and courts, to correct the violations (286 N. Y. at 513; R. 41) and the departures from the law committed by Respondent in exceeding its jurisdiction and openly failing

to perform the mandatory and ministerial duties prescribed by Section 522 (c) of the Tariff Act of 1930. Respondent claimed below that, notwithstanding their lack of such power, the Collector and the Customs Courts were given exclusive jurisdiction in customs matters. In answer Judge Conway, in his dissenting opinion in the Court of Appeals in this case, at page 513 of 286 N. Y. (R. 41), said:

> "To sustain this contention of respondent, would be to say that a Congressional statute by implication excluded State courts from exercising jurisdiction beyond the powers of the Collectors and the Customs Courts, although such jurisdiction had been conferred upon them by our laws. It is a sufficient answer to quote the following from *Dudley* v. *Mayhew* (3 N. Y. 9, 15):
>
> 'It is very clear that when a party is confined to a statutory remedy, he must take it as it is conferred; and that where the enforcing tribunal is specified, the designation forms a part of the remedy, and all others are excluded. *The rule is inapplicable, of course, where property or a right is conferred, and no remedy for its invasion is specified. Then the party may sustain his right or protect his property in the usual manner.* That is in such cases reasonably supposed to be the intention of the Legislature, *as it could not be the design to confer a barren property or a fruitless right, which could not be protected or enforced anywhere.*' (Italics supplied.)"

The Government, in its Brief in the Court of Appeals, urged that the action of Respondent "* * * is not subject to control by any court" (Point I, p. 17) and that it "* * * is not subject to control by a state court because such action is in performance of a government function of the United States" (Point II, p. 23), and that Congress has indicated an intent to restrict all reviews of customs questions to the United States Custom Court, "By the elaborate and comprehensive system for the administration of the customs laws which has been established, * * *" (Point III, pp. 32-33), conceding, however, that: "This limitation is

found, not in the words of any statute, but in the fact that Congress has established a comprehensive system * * *" (Brief, p. 15).

These points are sufficiently answered by Judge Conway in his dissent (See 286 N. Y. at 516-8, R. 45, 46; ib. at 512-3, R. 40, 41). Of course control by the federal courts has frequently been exercised. (*Waite* v. *Macy,* 246 U. S. 606, 608-10; *United States* v. *United States Tariff Commission,* 6 F. (2d) 491, reversed on ground case had become moot, in 274 U. S. 106; *Calf Leather Tanners' Ass'n* v. *Morgenthau,* 80 F. (2d) 536, 541-2, cert. den. 297 U. S. 718; *De Lima* v. *Bidwell* (assumpsit against Collector of Customs for exceeding his jurisdiction in exacting duties), 182 U. S. 1, 175-7, 179; *In re Fassett,* 142 U. S. 479, 486, 487 (libel); *Conklin* v. *Newton,* 2 Cir. 34 F. (2d) 612, 514 (conversion by Collector); *Giles* v. *Newton* (D. C. E. D. N. Y.), 21 F. (2d) 848 (conversion by Collector); Compare: *Hoyt* v. *Gelston* (1816), 13 Johns. R. 141, 151, aff'd 3 Wheat. 246, 334 (trespass against Collector of Customs for seizure of a ship); *Ripley* v. *Gelston* (1812), 9 Johns. R. 201 (assumpsit against Collector); *Schall* v. *Newton,* 217 App. Div. 171, aff'd 245 N. Y. 576 (conversion against Collector of Customs for breach of duty. Compare: *Blair* v. *United States,* 6 F. (2d) 481).) These cases necessarily uphold the jurisdiction (not exclusive of state court jurisdiction) of federal courts other than the Customs Courts to enforce by mandamus or injunction mandatory statutes involving the Tariff.

The fundamental rule of a court's existence that, where there is a right, it will find a remedy, has been ignored in an instance of a right explicitly accorded to importers, such as the Petitioner, by a federal statute flagrantly violated by a federal agent, the Respondent, to the great discrimination and grave injury of petitioner. (*Blair* v. *United States,* 6 Fed. (2d) 484, 486; *Richbourg Motor Co.* v. *U. S.,* 281 U. S. 528; *DeLima* v. *Bidwell,* 182 U. S. 1, 176-177, 179.)

The *DeLima* case, *supra,* was an action for money had and received brought by an importer against the Collector of the Port of New York, in the Supreme Court of the State of New York and subsequently removed to the Circuit Court, for duties illegally exacted on a cargo of sugar from Porto Rico that was held by this Court not to be "imported merchandise". There this Court said, at pages 176-177:

> "Conceding * * * that no remedy exists under the Customs Administrative Act, does it follow that no action will lie? If there be an admitted wrong, the courts will look far to supply an adequate remedy. * * * If the position of the Government be correct, the plaintiff would be remediless; and if a collector should seize and hold for duties goods brought from New Orleans, or any other concededly domestic port, to New York, there would be no method of testing his right to make such seizure. It is hardly possible that the owner could be placed in this position."

(See also review of the instant case in 55 Harvard Law Review at p. 674 (Feby. 1942) expressing the opinion that the decision of the New York Court of Appeals was erroneous.)

Not only was no power given to the Collectors or the Customs Courts by the Tariff Act of 1930, to compel the respondent to comply with the mandatory provisions of Section 522(c), and no adequate remedy was given by the Act to persons whose vested rights were violated by the refusal of the respondent so to comply, and consequently no basis whatever exists for the *implication* that Congress intended to confer exclusive jurisdiction upon the Collectors and the Customs Courts or any Courts having power to review their decisions, to enforce Section 522(c); but Congress, by investing Federal Reserve Banks with the power "to sue and be sued in any court of law or equity" expressly withdrew and intended to withdraw from the respondent any immunity from suit in State Courts and conferred upon persons so suing the right to make use of any appropriate state civil remedy to enforce the mandatory provisions of

Section 522(c). (*F. H. A.* v. *Burr*, 309 U. S. 242, 245, 249; *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381; *Federal Land Bank* v. *Priddy*, 295 U. S. 229, 237; Compare: *Claflin* v. *Houseman*, 93 U. S. 130; *St. Louis B. & M. R'y* v. *Taylor*, 266 U. S. 200, 207-8; *Minn. & St. Louis R. R. Co.* v. *Bombolis*, 241 U. S. 211, 218, 221.)

The annexed Brief, hereby made a part of this petition, as if fully set forth herein, presents thoroughly, in detail and with sufficient supporting cases, the grounds upon which petitioner relies in praying this Court for the allowance of a Writ of Certiorari in the above case.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of New York for New York County, commanding such Court to certify and send to this Court for its review and determination, at a date to be therein named, a full and complete transcript of the record and all proceedings, in the case entitled on its docket Index No. 6886—1939, *In the Matter of Armand Schmoll, Inc., Petitioner* v. *The Federal Reserve Bank of New York, Respondent;* that said order of the said Supreme Court of the State of New York for New York County may be reversed by this Honorable Court; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and proper.

Respectfully submitted,

HERSEY EGGINTON of
Larkin, Rathbone & Perry,
70 Broadway, New York, N. Y.
Attorneys for Armand Schmoll, Inc.,
Petitioner-Appellant.

Signed in behalf of the petitioner and its counsel on this 6th day of February, 1942.

By HERSEY EGGINTON.

Appendix

Statutes Involved

Relevant Provisions of Section 522 of The Tariff Act of 1930, as amended (U. S. C. Title 31 §372)

"Conversion of currency.

(a) Value of Foreign Coin Proclaimed by Secretary of Treasury.—The value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated quarterly by the Director of the Mint and be proclaimed by the Secretary of the Treasury quarterly on the 1st day of January, April, July, and October in each year.

"(b) Proclaimed Value Basis of Conversion.—For the purpose of the assessment and collection of duties upon merchandise imported into the United States on or after June 17, 1930, wherever it is necessary to convert foreign currency into currency of the United States, such conversion, except as provided in subdivision (c), shall be made at the values proclaimed by the Secretary of the Treasury under the provisions of paragraph (a) of this section, for the quarter in which the merchandise was exported.

"(c) Market Rate When No Proclamation.—If no such value has been proclaimed, or if the value so proclaimed varies by 5 per centum or more from a value measured by the buying rate in the New York market at noon on the day of exportation, conversion shall be made at a value measured by such buying rate. If the date of exportation falls upon a Sunday or holiday, then the buying rate at noon on the last preceding business day shall be used. For the purposes of this subdivision such buying rate shall be the buying rate for cable transfers payable in the foreign currency so to be converted; and shall be determined by the Federal Reserve Bank of New York and certified daily to the Secretary of the Treasury, who shall make it public at such times and to such extent as he deems necessary.

In ascertaining such buying rate such Federal reserve bank may in its discretion (1) take into consideration the last ascertainable transactions and quotations, whether direct or through exchange of other currencies, and (2) if there is no market buying rate for such cable transfers, calculate such rate from actual transactions and quotations in demand or time bills of exchange. (June 17, 1930, c. 497, Title IV, §522, 46 Stat. 739.)"

Relevant Provisions Of Article 78 (L. 1937, Ch. 526) Of The New York Civil Practice Act

The relevant provisions of Sections 1283, 1284, 1285, 1286, 1288, 1289, 1293, 1295, 1300 and 1306 of Article 78 of (new) *Article 78*, (L. 1937, Ch. 526) of the New York Civil Practice Act, are as follows:

"§1283. *Classifications of certiorari to review, mandamus and prohibition abolished.* The classifications and writs and orders of certiorari to review, mandamus and prohibition are hereby abolished. The relief heretofore obtained by such writs or orders shall hereafter be obtained as provided in this article. Whenever in any statute reference is made to a writ or order of certiorari, mandamus or prohibition, such reference shall, so far as applicable, be deemed to refer to the proceeding authorized by this article. * * *"

"§1284. *Definitions.*

"1. The expression 'body or officer' includes every court, tribunal, board, corporation, officer, or other person, or aggregation of persons, whose action may be affected by the proceeding under this article."

"2. The expression 'to review a determination' refers to the relief heretofore available in a certiorari or a mandamus proceeding for the review of any act or refusal to act of a body or officer exercising judicial, quasi-judicial, administrative or corporate functions, which involves an exercise of judgment or discretion."

"3. The expression 'to compel performance of a duty specifically enjoined by law' refers to all other relief heretofore available in a mandamus proceeding."

"4. The expression 'to restrain a body or officer exercising judicial or quasi-judicial functions from proceeding without or in excess or jurisdiction' refers to the relief heretofore available in a prohibition proceeding."

"Nothing in this article shall be deemed to continue or establish distinct remedies."

"§1285. *When relief not available.* Except as otherwise expressly prescribed by statute, the procedure under this article shall not be available to review a determination in any of the following cases: * * *

"3. Where it does not finally determine the rights of the parties with respect to the matter to be reviewed.

"4. Where it can be adequately reviewed by an appeal to a court or to some other body or officer."

"§1286. *Limitations of time.* A proceeding under this article to review a determination or to compel performance of a duty specifically enjoined by law, must be instituted by service of the petition and accompanying papers, as prescribed in Section twelve hundred eighty-nine of this article, within four months after the determination to be reviewed becomes final and binding, upon the petitioner or the person whom he represents, either in law or in fact, or after the respondent's refusal, upon the demand of the petitioner or the person whom he represents, to perform his duty, as the case may be; * * *"

"§1288. *Application for relief by petition; contents.* The application for relief shall be founded upon a petition, verified as in an action, which shall contain a plain and concise statement of the material facts on which the petitioner relies, may be accompanied by affidavits and other written proof, and shall demand the relief to which the petitioner supposes himself entitled, in the alternative or otherwise."

"§1289. *Notice of application; service.* At least eight days' notice in writing of an application for relief under this article shall be served upon the respondent, unless a shorter time is prescribed by an order to show cause granted by the court to which application is made or a judge thereof. A copy of the petition and accompanying papers shall be served with the notice or order to show cause. Service shall be made in the manner provided for the personal service of a summons in an action, unless a different manner of service is provided by the order to show cause."

"§1293. *Objections in point of law.* The respondent may raise an objection in point of law warranting the dismissal of the petition, by setting the objection forth in his answer or by applying to the court on the return day for an order dismissing the petition as a matter of law. If the respondent intends to apply for such an order, he shall serve notice thereof upon the petitioner within the time allowed for answering. In the event of the denial of such application, the court may permit the respondent to answer, upon such terms as may be just. * * *"

"§1295. *Hearing upon the application.* Upon the return day of the application, if no triable issue of fact is duly raised by the pleadings and accompanying papers, the court shall forthwith render such final order as the case requires. * * *"

"§1300. *Final order.* The court shall render a final order granting the petitioner the relief to which it deems he is entitled, or dismissing the proceeding, either on the merits or with leave to renew. * * * The court may also award such restitution as may be just. In an appropriate case, the court may award the petitioner the damages which he has sustained."

"§1306. *Applicability of provisions governing actions.* Except as otherwise expressly or by plain implication prescribed by statute, the provisions of statute and rule applicable to practice or procedure in an action applied to the proceeding under this article so far as such provisions can be applied to its substance and subject matter without regard to its form."

Appendix.

Title 12, U. S. C., Section 341, provides as to the powers and duties of Federal Reserve Banks, the relevant provisions of which are as follows:

> "§341. *General enumeration of powers.* Upon the filing of the organization certificate with the Comptroller of the Currency, a Federal reserve bank shall become a body corporate, and as such, and in the name designated in such organization certificate, shall have power— * * * Fourth. To sue and be sued, complain and defend, in any court of law or equity."

The relevant provisions of Section 632, of Title 12, U. S. C. are as follows:

> "§632. * * *; Jurisdiction where Federal reserve bank a party. * * *
>
> "Notwithstanding any other provision of law, all suits of a civil nature at common law or in equity to which any Federal Reserve bank shall be a party shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such suits; and any Federal Reserve bank which is a defendant in any such suit may, at any time before the trial thereof, remove such suit from a State court into the district court of the United States for the proper district by following the procedure for the removal of causes otherwise provided by law. No attachment or execution shall be issued against any Federal Reserve bank or its property before final judgment in any suit, action, or proceeding in any State, county, municipal, or United States court. (Dec. 23, 1913, c. 6, §25 (b); June 16, 1933, c. 89, § 15, 48 Stat. 184.)"

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No.

ARMAND SCHMOLL, INC.,

Petitioner,

v.

THE FEDERAL RESERVE BANK OF NEW YORK.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK FOR NEW YORK COUNTY

BRIEF FOR PETITIONER

HERSEY EGGINTON,
of Larkin, Rathbone & Perry,
70 Broadway,
New York, N. Y.,
Attorneys for Petitioner.

HERSEY EGGINTON,
GEORGE D. MUMFORD,
of Counsel.

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POINT THIRD—*McClung* v. *Silliman*, 6 Wheaton 598, relied upon by the Courts below, is not in point and, to the extent of any holding, is an affirmation by this Court of the jurisdiction of the state court in a proper case to issue mandamus running to a federal agent. As, on the stipulated facts of record in the case the act of May 10, 1800 (2 Stat. 73) was clearly not applicable to the lands in question and gave Silliman, as register, no authority over them and was not applied in this case, and as Silliman omitted to obtain a writ of error, this Court had no appellate jurisdiction under the 25th Section of the Judiciary Act to pass upon the question of the Register's immunity from the jurisdiction of the Ohio court. All statements in the opinion as to the immunity of a federal agent from the jurisdiction of a state court were, therefore, purely *obiter*.

So far as the plaintiff in error is concerned, he properly appealed from the judgment on the merits against him and the affirmance by this Court on the merits of the judgment of the Ohio State Court, which had determined preliminarily it had jurisdiction to issue mandamus, necessarily affirmed that jurisdiction. The judgment and *holding* of the *McClung* case was proper and was necessarily and simply to the effect that no court, state or federal, has jurisdiction to compel a federal agent to exceed or disregard his plain, limited statutory authority 51

POINT FOURTH—The order and judgment of the Supreme Court of the State of New York, as confirmed by the judgment of the Court of Appeals, denying Petitioner's application for lack of jurisdiction to issue an order in the nature of mandamus running to respondent, requiring compliance with Section 522(c) of the Tariff Act of 1930, should be reversed and the proceedings remanded to the Supreme Court of the State of New York with the direction to hear and decide the proceedings upon the merits 56

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Supreme Court of the United States

OCTOBER TERM 1941

No.

IN THE MATTER

of

ARMAND SCHMOLL, INC.,
Petitioner and Appellant Below,

v.

THE FEDERAL RESERVE BANK OF NEW YORK,
Respondent and Appellee Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The official report of the opinions delivered in the Court of Appeals is contained in 286 N. Y. 503-525. A copy is printed at pages 34-52 of the Record. The opinion of Mr. Justice Rosenman at Special Term was not reported, but a copy appears at pages 28-29 of the Record.

The Statement of the grounds of this Court's "Jurisdiction to Review" the Summary Statement of the Matter Involved," the "Statement of Facts," the "Statutes Involved" and the "Questions Presented," contained in the annexed Petition, are hereby referred to and repeated with the same force as if herein set forth.

Questions Presented and Specification of Errors

The "Questions Presented" at pages 11, 12 and 13 of the annexed Petition for writ of certiorari are the Questions Presented and the assigned errors which Petitioner desires to urge.

Supplemental Statement

The facts in addition to those stated in the annexed Petition may in their essentials be put briefly as follows: By § 522(c), of the Tariff Act of 1930 (June 17, 1930, c. 497; IV, § 522(c) (46 Stat. 739); Title 31, U. S. C. § 372) it became the statutory ministerial duty of Respondent to certify daily to the Secretary of the Treasury the actual buying rates in the New York market for cable transfers payable in Brazilian milreis. The Petition shows that all the daily transactions were duly reported, as required, to the Respondent, and that the actual market rates, continuously prevailing throughout the three months covered by the Petition were in the official possession and knowledge of Respondent, and that it was an actual New York market and that such exchange could be had at firm rates constantly throughout this period (R. (fol. 8) 8-11, 16-19 (fol. 8)). It appears that notwithstanding Respondent's possession of its official evidence to the contrary (see annexed Petition for certiorari, pp. 4, 5), it certified daily a higher rate than the actual New York market rates, characterizing each rate it certified: "Nominal rate. Firm rate not available" (R. (fol. 8) 7-8, 9, 10). In substance the actual market rates did not exceed $0.585 per milreis in this period but the Respondent certified rates no lower than $0.08250 and as high as $0.084700 (R. 8, 9, 10, 14, 15, 16, 17, 18, 19).

Summary of Argument

(1) The Issues Really Involved.

(2) The Courts below erred in holding that the Supreme Court of New York was without jurisdiction to order respondent to comply with Section 522(c) of the Tariff Act of 1930, inasmuch as the Supreme Court, although a state court, can exercise its ordinary jurisdiction to compel respondent to comply with the federal law or to cease violation thereof, which, as the Supreme Law of the land, is also the law of the State of New York;

and this because its order directing respondent so to do would not in any way interfere with respondent's duty or destroy or impair its official ability to perform its mandatory statutory function, and so would not encroach in anywise upon the sovereignty of the federal government.

(A) Concurrent Jurisdiction of State Courts.

(B) The reporting of the market rates in compliance with the tariff act is not and should not be an exception to the rule of concurrent jurisdiction.

(C) The Congress has not granted exclusive jurisdiction over market rates to any federal authority.

(D) The local law, including substantive remedies, is made applicable by this Court.

(3) *McClung* v. *Silliman,* 6 Wheaton 598, relied upon by the Courts below, is not in point and, to the extent of any holding, is an affirmation by this Court of the jurisdiction of the state court in a proper case to issue mandamus running to a federal agent. As, on the stipulated facts of record in the case the act of May 10, 1800 (2 Stat. 73) was clearly not applicable to the lands in question and gave Silliman, as register, no authority over them and was not applied in this case, and as Silliman omitted to obtain a writ of error, this Court had no appellate jurisdiction under the 25th Section of the Judiciary Act to pass upon the question of the Register's immunity from the jurisdiction of the Ohio court. All statements in the opinion as to the immunity of a federal agent from the jurisdiction of a state court were, therefore, purely obiter.

So far as the plaintiff in error is concerned. he properly appealed from the judgment on the merits against him and the affirmance by this Court on the merits of the judgment of the Ohio State Court which had determined preliminarily it had jurisdiction to issue mandamus, necessarily affirmed that jurisdiction. The judgment and *holding* of the *McClung* case was proper and was necessarily and simply to the effect that no court, state or federal, has jurisdiction to compel a federal agent to exceed or disregard his plain, limited statutory authority.

(4) The order and judgment of the Supreme Court of the State of New York, as confirmed by the judgment of the Court of Appeals, denying Petitioner's application for lack of jurisdiction to issue an order in the nature of mandamus running to respondent, requiring compliance with Section 522(c) of the Tariff Act of 1930, should be reversed and the proceedings remanded to the Supreme Court of the State of New York with the direction to hear and decide the proceedings upon the merits.

ARGUMENT

POINT FIRST

The Issues Really Involved.

With the Respondent certifying rates on an average some 50% higher than the actual New York market rates prescribed, the issue in this case becomes and may be definitely stated:

It is whether the Supreme Court of New York, solely because it is a state court, is without jurisdiction to compel the Respondent, a resident corporation of New York, to perform the duties imposed upon it by a federal statute, § 522(c) of the Tariff Act of 1930, in the manner prescribed and directed by that Statute.

It appears from the Act and from the Petition that these duties were simply mandatory and ministerial. Respondent's only duty is to ascertain the buying rates in the New York market at noon on each day, a simple arithmetical calculation from market rates which at the time varied only a few hundredths of a cent every day and from day to day and report them to the Secretary of the Treasury. Respondent, by its motion to dismiss, admitted not only that the rates it certified were not the actual market rates and, accordingly, that it exceeded its powers under the statute, but that the actual New York market rates were as set forth in Schedule B of the Petition (R. 16 (fol. 23)).

Mandamus or its equivalent is the proper means to correct these abuses of statutory power and courts may direct compliance with a statutory mandate, even though their interpretation of the statute prescribing the agent's jurisdiction may have the effect of requiring the agent to act in a particular way. (*Baird* v. *Supervisors,* 138 N. Y. 95, 115, 116; *Matter of Lewis* v. *Carter, Individually and as the Board of Parole for State Prisons,* 220 N. Y. 8, 18; *People ex rel. Equitable Life Ass. Soc.* v. *Pierce,* 187 App. Div. 437, aff'd 229 N. Y. 514; *Matters of Potts* v. *Kaplan,* 264 N. Y. 111, 117-118; *Louisville Cement Co.* v. *I. C. C.,* 246 U. S. 638 642, 644; *Wilbur* v. *Krushnic,* 280 U. S. 306, 318; *Miguel* v. *McCarl,* 291 U. S. 442, 452, 456; *Payne* v. *Central Pacific Ry. Co.,* 255 U. S. 228, 238; *I. C. C.* v. *Northern Pacific Ry. Co.,* 216 U. S. 538, 544-5.) With a market for cable transfers actually continually existing in New York there is no discretion vested in Respondent by the Tariff Act. Respondent's duties prescribed by Section 522(c) are mandatory, and it is a jurisdictional limitation upon the Respondent's power that the rates it certifies must be the buying rates for cable transfers payable in the foreign currency in the New York market at noon on each day (*Waite* v. *Macy,* 246 U. S. 606, 608-10, aff'g *Macy* v. *Brown,* 225 Fed. 359, and cases there cited; *I. C. C.* v. *Northern Pacific Ry Co.,* 216 U. S. 538; *De Lima* v. *Bidwell,* 182 U. S. 1, 175-7). Thus the sole question is the validity of the Respondent's claim that, as a federal agent, he cannot be controlled by a state court. Under the federal Constitution, state courts have jurisdiction concurrently with the federal courts to protect and enforce rights created by federal statute. Congress may limit that concurrent jurisdiction by granting exclusive jurisdiction to the federal courts, but the question is always, "Has it done so?" The failure of the Congress to take that action as to the rights created by § 522(c) of the Tariff Act is a clear indication that its intention was not to limit the ordinary powers of the state courts to enforce those rights. That such was the

intention of the Congress is confirmed by the fact that, while it had withheld from the federal courts having personal jurisdiction over the Respondent the power to issue original writs of mandamus, it had already deprived the Respondent of its immunity from suit as a federal agent by specifically providing that a Federal Reserve Bank "shall have power * * * to sue and be sued, complain and defend in any court of law or equity" (12 U. S. C. § 341). Congress, by vesting Federal Reserve Banks with the power "to sue and be sued in any court of law or equity", expressly withdrew and intended to withdraw from Respondent any immunity from suit in the state courts and conferred upon persons so suing it the right to make use of any appropriate state civil remedy. This necessarily includes mandamus in the instant case. (*F. H. A.* v. *Burr*, 309 U. S. 242, 245, 249; *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 281; *Northern Pacific Ry. Co.* v. *North Dakota*, 250 U. S. 135, 152; compare *Calf Leather Tanners' Ass'n* v. *Morgenthau*, 80 F. (2d) 536, cert. den. 297 U. S. 718.) Under the *expressio unius* rule, Congress, in Section 632 of Title 12, U. S. C. by specifically excepting Federal Reserve banks from attachment or execution before final judgment authorized all other state civil remedies to be applied against them. *F. H. A.* v. *Burr*, 309 U. S. 242.

The ordinary jurisdiction of the state courts is not to be defeated by implication (*Galveston, H. & S. A. Ry. Co.* v. *Wallace*, 223 U. S. 481-490; *People* v. *Welch*, 141 N. Y. 266, 272-3). The failure of Congress by the Tariff Act to vest power exclusively in federal courts is in effect an affirmation by Congress of the constitutional right of the state courts to use their ordinary powers and remedies to enforce those rights. This is confirmed by the fact that Congress had withheld from all federal courts having jurisdiction over Respondent the power to issue original writs of mandamus, but Congress had granted power for Respondent to sue and to be sued in state courts (Title 12, U. S. C. § 341). Of the federal district courts, only the Supreme Court of

the District of Columbia has original jurisdiction to issue mandamus (*Kendall* v. *United States*, 12 Pet. 524). Of course, the Customs Courts have no such power. This Court will be astute not to construe by implication the Act so as to preclude the ordinary jurisdiction of the state courts, especially when any such implication would leave the Petitioner without any remedy to enforce the rights created by the Congress, and would subject it and all other importers to the arbitrary whim of Respondent. (Dissent of Conway, J., 286 N. Y. at 523-525, R. 50, 51; *De Lima* v. *Bidwell*, 182 U. S. 1, 177; *Jones* v. *Securities Commission*, 298 U. S. 1, 23-24; *Garfield* v. *Goldsby*, 211 U. S. 249, 261-262; *First National Bank* v. *Missouri*, 263 U. S. 640, 659-60; *Blair* v. *United States*, 6 F. (2d) 484, 486; *People* v. *Welch*, 141 N. Y. 266, 272-3; *Dudley* v. *Mayhew*, 3 N. Y. 9, 15.)

POINT SECOND

The Courts below erred in holding that the Supreme Court of New York was without jurisdiction to order respondent to comply with Section 522(c) of the Tariff Act of 1930, inasmuch as the Supreme Court, although a state court, can exercise its ordinary jurisdiction to compel respondent to comply with the federal law or to cease violation thereof, which, as the Supreme Law of the land, is also the law of the State of New York; and this because its order directing respondent so to do would not in any way interfere with respondent's duty or destroy or impair its official ability to perform its mandatory statutory function, and so would not encroach in anywise upon the sovereignty of the federal government.

(A)

Concurrent Jurisdiction of State Courts.

The Supreme Court of New York has jurisdiction, concurrently with the federal courts, to enforce rights created by federal statutes, including Section 522(c) of the Tariff

Act of 1930, in the manner commanded by such statutes where, as here, Congress has not made the jurisdiction of the federal courts exclusive, and has in terms permitted the Respondent to be sued in the State Courts. In the exercise of that jurisdiction, the Supreme Court of New York may grant any appropriate relief afforded by the New York laws, including an order in the nature of mandamus. For over a century, in substantially every form of civil action, the courts of New York and of the other states have exercised personal control over federal statutory agents acting unlawfully under color of a federal statute or beyond the scope of their statutory authority.

A state court may exercise this concurrent jurisdiction to enforce the federal law, even as against a federal agent. For over one hundred years and in substantially every form of civil action, the courts of this and other states, with the continuous approval of this Court, have compelled federal agents, including collectors of customs, to respond in damages for their failure to comply with federal statutes prescribing ther duties. (*Bates* v. *Clark* (1877), 95 U. S. 204, 208, 209; *United States* v. *Lee* (1882, 106 U. S. 196, 219-20; *Teal* v. *Felton* (1848), 1 N. Y. 537, 545-9, aff'd in 12 How. 284, 291-2, (doctrine reaffirmed in *Claflin* v. *Hauseman* (1873), 93 U. S. 130, 142); *Gelston* v. *Hoyt* (1816), 3 Wheat. 246, 334, aff'g 13 Johns R. 141, 151 (trespass against collector of customs); *De Lima* v. *Bidwell* (1900), 182 U. S. 1, 175-177, 179 (assumpsit against collector of customs); *Schall* v. *Newton* (1927), 217 App. Div. 171, aff'd 245 N. Y. 576 (conversion against a collector of customs).)

State courts have been held by this Court to have jurisdiction by mandamus or injunction to require federal agents to keep within their federal statutory authority and jurisdiction. (*Northern Pac. Ry. Co. and Walker D. Hines, Director General of Railroads* v. *North Dakota* (1918), 250 U. S. 135, 152; *First Nat'l Bank* v. *Union Trust Co.* (1916), 244 U. S. 416.)

Thus it is clear that not only have state courts the jurisdiction to give judgments for damages against federal agents for violation of federal statutory duties and to require them to keep within the limitations of the authority and jurisdiction conferred upon them by the Congress, but also actually to order them to perform duties imposed by federal statute. (*Northern Pacific Ry. Co.* v. *North Dakota,* 250 U. S. 135, 152 (mandamus); *First National Bank* v. *Union Trust Co.,* 244 U. S. 416, (quo warranto); *Matter of Hurley* v. *Nat'l Bank of Middletown,* 252 App. Div. 272, 273 (mandamus); *Witnebel* v. *Loughman,* 2 Cir., 80 F. (2d) 222, 225, *cert. denied* 297 U. S. 716 (mandamus); *Murray* v. *Walker* (1913), 156 Ky. 536 (mandamus). Also see: *Guthrie* v. *Harkness,* 199 U. S. 148 (mandamus); *Matter of Tuttle* v. *Iron Nat'l Bank,* 170 N. Y. 9 (mandamus); *People ex rel. Lorge* v. *Consolidated Nat'l Bank,* 105 App. Div. 409 (mandamus).)

This doctrine of concurrent jurisdiction was completely adopted and fully expounded by this Court in *Claflin* v. *Hauseman,* 93 U. S. 130. In that case the objections urged by Respondent and the grounds given by the Courts below were urged with great precision by the late Judge William Henry Arnoux (93 U. S. at 132) and definitely rejected by this Court, relying upon *Houston* v. *Moore* (1820), 5 Wheat. 1, and applying the fundamental principles expressed in the eighty-second article of the Federalist. (93 U. S. at 141, 138 et seq.: The doctrine of the *Claflin* case was completely endorsed and restated in *Second Employers' Liability Cases* (1911), 223 U. S. 1, 55-59, and in *Minneapolis & St. Louis R. Co.* v. *Bombolis* (1915), 241 U. S. 211, 218, 221-2.) (See also *Hines* v. *Lowrey,* 305 U. S. 85, 91.)

This concurrent jurisdiction of state courts in respect of federal agents is completely confirmed by the Congressional grant of permission and power to sue Respondent (Title 12, U. S. C. § 341) with all that that implies (*F. H. A.* v. *Burr,* 309 U. S. 242, 245, 249), and by the tendency of Congress and recent decisions of this Court

sharply to minimize, if not wholly to abrogate, the immunity of federal agents acting under federal laws (*Keifer & Keifer* v. *R. F. C.*, 306 U. S. 38; *F. H. A.* v. *Burr*, 309 U. S. 242).

Until such time as the Congress acts to deprive state courts of their concurrent jurisdiction to enforce rights created by acts of the Congress, it is not only the right but the constitutional duty of the Supreme Court of New York to protect its citizens from the capricious and unlawful acts of federal agencies (*Claflin* v. *Houseman*, 93 U. S., 130, 133-143; *Second Employers Liability Cases*, 223 U. S., 1, 55-9; *Minn. & St. Louis RR. Co.* v. *Bombolis*, 241 U. S., 211, 218-221; *People* v. *Welch*, 141 N. Y. 266). Neither the Respondent nor the Government has been able to point to any provision of law either directly or impliedly depriving state courts of their ordinary concurrent jurisdiction to enforce rights created by § 522(c) of the Tariff Act of 1930. Furthermore, where, as with § 522(c), the federal statute fails to supply a remedy for its breach, the state court has power to grant such relief as its state laws may authorize in the manner and to the extent prescribed by its state laws even though a federal District Court might not have power to exercise a remedy open to the state court (*St. Louis B. & M. Ry.* v. *Taylor*, 266 U. S. 200, 207-8; *First National Bank* v. *Missouri*, 263 U. S. 640, 661; *Minn. & St. Louis RR. Co.* v. *Bombolis*, 241 U. S., 211, 218-221; *Dudley* v. *Mayhew*, 3 N. Y. 9, 15).

(B)

The reporting of the market rates in compliance with the tariff act is not and should not be an exception to the rule of concurrent jurisdiction.

There is no basis in law or reason for making this instance an exception to the general rule that, in the absence of Congressional restrictions, state courts have jurisdiction to enforce federal laws and protect rights arising under

them, in reason including the power to require federal agents to perform their statutory duties. This proceeding is against Respondent only individually to compel it to perform a personal statutory duty. An order directing it to comply or restraining it from violating that duty would not interfere with Respondent's official duties but would be in aid of the clear federal mandate. The description by the Courts below of the Respondent's incidental acts under §522(c) of the Tariff Act as "governmental functions" does not make them an exercise of the sovereign or political power of the federal government. Those prescribed duties are plainly mandatory and ministerial and their performance by federal agents should be ordered by state as well as Federal courts, which latter since Kendall v. *United States* (1838), 12 Pet. 524, *have exercised such jurisdiction for over one hundred years; for, otherwise and equally, federal courts would have no jurisdiction to require state agents to perform mandatory state so-called "governmental functions", which federal courts have compelled state agents to perform through the past seventy-five years.*

Mandamus or an order of that nature, like any other form of relief, is not directed to a statutory agent, such as the Respondent, in its "official," but in its "individual" capacity. It is the accepted remedy to compel a statutory agent to perform its statutory duties (*United States* v. *Boutwell,* 17 Wall. 604; *Warner Valley S. Co.* v. *Smith,* 165 U. S. 28, 32; *Pullman Co.* v. *Croom,* 231 U. S. 571, 575-6; *Marbury* v. *Madison,* 1 Cranch, 137, 166, 170; *Garfield* v. *Goldsby,* 211 U. S. 249, 261-2; *Wilbur* v. *Krushnic,* 280 U. S. 306, 318-9; *Matter of Lewis* v. *Carter,* 220 N. Y. 8, 18.

This Court, in *Northern Pac. Ry. Co. and Walker D. Hines, Director General of Railroads* v. *North Dakota,* 250 U. S. 135, 152, pointed out that such a suit is not against the United States when the federal agent is alleged to have exceeded his authority. The fact that the Respondent may be a "federal statutory agent," while acting within the scope of its statutory authority, is quite immaterial. When

acting outside the scope of his authority he is merely a trespasser or usurper (*Bates* v. *Clark,* 95 U. S. 204, 209; *United States* v. *Lee,* 106 U. S. 196, 219-20; *Western Union Tel. Co.* v. *Henderson,* 68 Fed. 588, 598).

When state court actions have been met with this objection, courts having generally disposed of the point upon finding that the state court's usual concurrent jurisdiction had not been taken away by Congress granting exclusive jurisdiction over the subject to the federal courts. (*Teal* v. *Felton,* 1 N. Y. 537, aff'd 12 How. 284, 392; *People* v. *Welch,* 141 N. Y. 266, 273, 275; *Claflin* v. *Houseman,* 93 U. S. 130—doctrine reaffirmed *Hines* v. *Lowrey,* 305 U. S. 85, 91; *First Nat'l Bank* v. *Missouri,* 263 U. S. 640, 656; *First Nat'l Bank* v. *Union Trust Co.,* 244 U. S. 416, 427-8.)

The order sought by Petitioner would not interfere with the performance of the federal agent's official duties and would not destroy or in any wise impair that agent's authority and efficiency. It would bring about performance of the non-discretionary statutory duties and thus vindicate the office and authority and secure efficiency. The Respondent seeks to apply to state courts alone a limitation which applies to all courts. No court, state or federal, has jurisdiction to "interfere" with the lawful performance by a federal agent of its federal statutory duties, "governmental" or otherwise. The test of whether an order directing a federal agent to perform its statutory duties "interferes" is whether the relief sought would seriously or gravely impair or destroy the efficiency of the federal agent to discharge the duties imposed upon it by the federal act or would encroach upon the sovereignty of the federal government. (*F. H. A.* v. *Burr,* 309 U. S. 242, 245. Compare: *National Bank* v. *Commonwealth,* 9 Wall. 353, 361-2 and *First National Bank* v. *Missouri,* applying the same rule to State legislation.) An order directing the Respondent merely to comply with the statute under which it is purporting to act, in this case Section 522(c), would not fall within this limitation. *Northern Pacific Ry. Co.* v. *North Dakota,* 250 U. S. 135, 152. Such an order would be in aid of, and not

an interference with, the Respondent's pre-existing personal statutory duty (Compare: *Penn Gas Co.* v. *Public Service Comm.*, 225 N. Y. 397, 406; *Western Union Tel. Co.* v. *Milling Co.*, 218 U. S. 406, 416-420; *Chicago, etc. Ry. Co.* v. *Solan*, 169 U. S. 133, 137-8; *Western Union Tel. Co.* v. *James*, 162 U. S. 650, 652). The only interference would be with Respondent's unlawful acts, which are not "official" and are nullities. (*Baird* v. *Supervisors*, 138 N. Y. 95, 115, 116; *Matter of Lewis* v. *Carter*, 220 N. Y. 8, 18). Since a federal court mandamus or injunction order, directing the Respondent to perform its mandatory ministerial, so-called "governmental" functions or duties, or restraining it from transgressing its authority and violating vested rights created by the act, would not be a prohibited "interference" (*Waite* v. *Macy*, 246 U. S. 606, 608-10; *Wilbur* v. *Krushnic*, 280 U. S. 306, 319), neither should a state court order in the same terms constitute such an "interference". In the words of Chief Justice Marshall in *Marbury* v. *Madison*, 1 Cranch. 137 at page 170:

> "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined."

The cases heretofore cited or to be cited against this position involve in each instance attempts to require the federal agent to do an act either beyond, or in violation of, his authority and so do not apply. (*McClung* v. *Silliman*, 6 Wheat. 598; *Ex parte Shockley*, 17 F. (2d) 133; *Ohio* v. *Thomas*, 173 U. S. 276).

If this relief were sought in a federal court having jurisdiction, the direction to the federal agent to perform its "governmental functions" would not be a prohibited "interference". By the same reasoning a state court judgment in the same terms would not be an interference. Respondent would be protected from any errors of the state court by its right to appeal to this Court, under Section 237 of the Judicial Code (28 U. S. C. A. 344, 861).

In reason it can make no difference whether the direction comes from a federal or a state court, as this Court has repeatedly declared that they are both courts of a common country and the laws of the state and the nation form one system of jurisprudence within the state (*Claflin* v. *Houseman*, 93 U. S. 130, 136-7; *Second Employees' Liability Cases*, 223 U. S. 1, 55-9; *Minneapolis & St. L. R. R.* v. *Bombolis*, 241 U. S. 211, 221-2; *Hines* v. *Lowrey*, 305 U. S. 85, 91). So long as the statutory duties are mandatory and ministerial and the statute prescribes even the terms of any discretion, these duties are enforcible. So long as the duty is mandatory and not discretionary it is immaterial that the duties sought to be enforced are so-called "governmental functions" and the courts have power to determine the correct construction of the statute and to compel the Respondent to proceed accordingly (*Kendall* v. *United States*, 12 Pet. 524; *Waite* v. *Macy*, 246 U. S. 606, affirming *Macy* v. *Browne*, 224 Fed. 359; *Merritt* v. *Welsh*, 104 U. S. 694; *Garfield* v. *Goldsby*, 211 U. S. 249, 261-2; *People ex rel. Hilliker* v. *Pierce*, 64 Misc. 627; *Lane* v. *Hoglund*, 244 U. S. 174, 37 S. Ct. 558, 61 L. Ed. 1066; *Louisville Cement Co.* v. *I. C. C. Commission*, 246 U. S. 638, 38 S. Ct. 408, 62 L. Ed. 914).

As is pointed out in the Petition for Certiorari (*supra*, pp. 14, 15), the Respondent's duty in reporting the rates actually registered by the New York market itself does not involve a "government function" in the sense of an act of the sovereign or an exercise of discretion or of political power.

Again, as pointed out in that Petition (*supra*, p. 18), the theory of exclusive governmental functions, if it really existed, would be mutual but this Court has negated that theory by holding that federal courts have jurisdiction to require state officers to perform governmental duties imposed upon them by state laws (*Riggs* v. *Johnson County*, 6 Wall. 166, 188 (73 U. S.); *Supervisors* v. *United States*, 4 Wall. 535; *Von Hoffman* v. *City of Quincy*, 4 Wall. 535; *U. S. ex rel. Ranger* v. *New Orleans*, 98 U. S. 381; *Mobile*

v. *Watson,* 116 U. S. 289; *Marion County Court* v. *Huidekoper,* 134 U. S. 332; *Arkansas* v. *St. Louis-S. F. Ry. Co.,* 269 U. S. 172). So, also, it is the established law that the courts of the United States have power to enjoin state officers from exceeding their statutory authority (*Board of Liquidation* v. *McComb,* 92 U. S. 531, 541; *Allen* v. *Balto. & O. R. R. Co.* 114 U. S. 164; *Pennoyer* v. *McConnaughy,* 140 U. S. 1, 10, 13; *In re Tyler,* 149 U. S. 164; *Scott* v. *Donald,* 165 U. S. 107; *Reagan* v. *Farmers L. & T. Co.,* 154 U. S. 362; *Smythe* v. *Ames,* 169 U. S. 466; *ex parte Young,* 209 U. S. 123, 155, 158-9).

Surely, if the federal courts have jurisdiction to compel state agents to comply with the state law and would not "interfere" with state agents by commanding their performance, it must also be true that state courts have like jurisdiction over federal agents as to execution of federal statutes.

(C)

The Congress has not granted exclusive jurisdiction over market rates to any federal authority.

The Congress has not expressly vested exclusive jurisdiction over matters arising under Section 522(c) of the Tariff Act in the Collectors of Customs, in the Customs Courts having power to review their decisions or in any other federal court or authority. It cannot in reason be deemed that the Congress has established such exclusive jurisdiction by implication, inasmuch as neither the Collectors nor the Customs Courts, nor any other federal court having jurisdiction over Respondent has jurisdiction to bring it in as a party to the proceedings, or to compel it by any order or judgment, much less mandamus, to comply with § 522(c).

The Government has conceded in its briefs below that there is no direct language in the Tariff Act giving the federal customs authorities exclusive jurisdiction (At-

tached Petition, *supra* 22, 23). The claim is that this authority may be inferred from Sections 514 and 515 of the Tariff Act of 1930. These sections merely provide that all decisions of the Collectors, including the legality of all orders and findings entering into the same as to the rate and amount of duty chargeable, shall be final and conclusive upon all persons within sixty days thereafter, unless the importer shall file a protest in writing with the Collector; that, upon the filing of such protest, the Collector shall review his decision within ninety days; that, if he shall affirm the same, he shall forthwith transmit the matter to the Customs Court for determination as provided by law; and that the decisions of the Customs Court are reviewable by appeal to the Court of Customs and Patent Appeals.

Any inference from these provisions of exclusive jurisdiction is wholly unwarranted. No remedy is provided in terms by the Tariff Act for any failure on the part of the Respondent correctly to certify to the Secretary of the Treasury, or of the Customs authorities independently to apply, the actual buying rate. That rate is actually determined daily by the market and not by the customs authorities. These rates automatically registered in the New York market and directed to be certified daily by the Respondent, while they are a condition precedent to any use of them by the Collector in liquidating duties, are not any part of the ordinary customs process regulated by Section 514 (§ 1514, 31 U. S. C). Section 522(c) was a new section, creating new rights and, by implication, remedies, in addition to the older Section 514. This legislation, in the absence of specific exclusion, does not deprive the state courts of jurisdiction unless the remedy provided is adequate. *Waite* v. *Macy,* 246 U. S. 606; *Calf Leather Tanners Ass'n.* v. *Morgenthau,* 80 Fed. (2nd) 536, 542, *cert. den.* 297 U. S. 718; *Blair* v. *United States,* 6 F. (2d) 484, 486; *In re Fassett,* 142 U. S. 479, 487; *DeLima* v. *Bidwell,* 182 U. S. 1, 175-7; *Dudley* v. *Mayhew,* 3 N. Y. 9, 15; *Oneida Com. Ltd.* v. *Oneida Game Trap Co.,* 168 App. Div. 769, 771, 774-8. Certainly these bodies are not

vested with any general judicial powers and Respondent could neither be brought in as a party to their proceedings nor could such authorities enforce any adequate remedy such as mandamus.

It is clear that Collectors of Customs and federal courts having power to review their decisions do not have exclusive jurisdiction over issues arising under the Tariff Act where they have no power to give adequate relief (*Blair* v. *U. S.*, 6 Fed. (2nd) 484, 486). The mere fact that the Collector might hold that Respondent had not complied with the law, is not enough, for then the duties would not be liquidated and Petitioner's deposits at unlawful rates would be unrecoverable. There still would be no way to compel Respondent to comply with Section 522(c) by certifying the actual market rate, unless the courts below have jurisdiction to command Respondent, and the customs authorities and courts have no such power. Any remedy, other than mandamus, is inadequate and no bar to the relief sought by Petitioner. (*Kendall* v. *U. S.*, 12 Pet. 524; *Fremont* v. *Crippen*, 10 Cal. 211; *American Ry. Frog Co.* v. *Haven*, 101 Mass. 398; *Eureka Pipe Line Co.* v. *Riggs*, 75 W. Va. 353, 83 S. E. 1020, 93 A. L. R. 590-591, anno.) Judge Conway definitely stated it as follows (286 N. Y. at 524, 525, R. 51): "There is no other adequate remedy than mandamus. Recoverable damages are inadequate (*Kendall* v. *United States*, 12 Pet. at pp. 614, 615). There is no jurisdiction in the customs authorities or courts to consider the question and, if there were, the power could not be effectively or adequately exercised by customs authorities or courts, for respondent would not or could not be a proper party to those proceedings and, if it were, there exists no power in those customs authorities or courts to command compliance by respondent with the Tariff Act by certifying the actual market rates."

(D)

The local law, including substantive remedies, is made applicable by this Court.

Undoubtedly the right to mandamus is a substantive right, and the law of New York in its statutes and decisions giving mandamus or an order of its nature to prevent departures from mandatory statutory duties by governmental agents or officials is now plainly the local law to be applied in keeping with this Court's ruling in Erie R. R. Co. v. *Tompkins,* 304 U. S. 64.

It is sufficient under this subdivision to call this Court's attention to the fact that by its recent ruling in the *Erie R. R.* v. *Tompkins* case it has fully recognized the primacy of the local or state law, whether expressed in statutes or decisions of the highest state courts. Within this rule the right to mandamus, the only remedy which can possibly furnish petitioner with adequate relief, is a substantive and substantial right. The power to furnish an appropriate remedy is a state's right. The State of New York, however, by the Court of Appeals saying it was bound by the *McClung* case, disregarding the *Claflin* case and, not appreciating the *Tompkins* case, did not declare this right for itself, and so withheld mandamus. But this Court has very recently said: "This Court will review or independently determine all questions on which a federal right is necessarily dependent. *United States* v. *Ansonia Brass & Copper Co.,* 218 U. S. 452, 462-463, 471; *Ancient Egyptian Order* v. *Michaux,* 279 U. S. 737, 744-745; *Broad River Power Co.* v. *South Carolina,* 281 U. S. 537, 540; *Pierre* v. *Louisiana,* 306 U. S. 354, 358." (*United States, Petitioner* v. *Pink* (February 2, 1942), United States Law Week (Vol. 10, Sec. 4), p. 4173.) Now, in keeping with this Court's recently declared rule, this Court should say to the New York Supreme Court that it *must* determine and apply its own remedies and may do so in this case by an order in the nature of mandamus, if upon a hearing the facts and merits are found to warrant it.

POINT THIRD

McClung v. _Silliman_, 6 Wheaton 598, relied upon by the Courts below, is not in point and, to the extent of any holding, is an affirmation by this Court of the jurisdiction of the state court in a proper case to issue mandamus running to a federal agent. As, on the stipulated facts of record in the case, the act of May 10, 1800 (2 Stat. 73) was clearly not applicable to the lands in question and gave Silliman, as register, no authority over them and was not applied in this case, and as Silliman omitted to obtain a writ of error, this Court had no appellate jurisdiction under the 25th Section of the Judiciary Act to pass upon the question of the Register's immunity from the jurisdiction of the Ohio court. All statements in the opinion as to the immunity of a federal agent from the jurisdiction of a state court were, therefore, purely _obiter_.

So far as the plaintiff in error is concerned, he properly appealed from the judgment on the merits against him and the affirmance by this Court on the merits of the judgment of the Ohio State Court, which had determined preliminarily it had jurisdiction to issue mandamus, necessarily affirmed that jurisdiction. The judgment and holding of the _McClung_ case was proper and was necessarily and simply to the effect that no court, state or federal, has jurisdiction to compel a federal agent to exceed or disregard his plain, limited statutory authority.

The Courts below have mistakenly relied upon the *McClung case* as controlling and conclusive authority on the unsound theory that this Court had there held that the federal and state governments were mutually exclusive jurisdictions and that the state court had no power to command or enforce performance by a federal agent of federal mandatory statutory duties, inasmuch as only the creator (the fed-

eral government) could control the acts of the created (the federal agent). This mistake is obvious, for any and all opinions there expressed by Judge Johnson as to the immunity of the federal agent from the order or direction of the state court of Ohio are purely *obiter,* for the Government and the federal agent had not appealed from the Ohio court judgment which also was in their favor and so this Court under the Judiciary Act was without any power to review and decide that question of federal immunity. That there was no intention to so decide that question appears from the fact that one year prior to the McClung case this Court, in *Houston* v. *Moore,* 5 Wheaton 1, 24 *et seq.* (with Judges Johnson and Story dissenting), had squarely decided that a state court had concurrent jurisdiction to execute and enforce the military law of the United States and to punish a violation of it. This jurisdiction of state courts was reaffirmed and reapplied by this Court in *Claflin* v. *Houseman,* 93 U. S. 130, 141-2, over the objection of counsel that the state court was without power even to "aid in enforcing" the federal law (See 93 U. S. at 132). This is made clear by Conway, J. (286 N. Y. at 517-522, R. 45-49).

On the part of *McClung,* the Petitioner for the writ, this Court had appellate jurisdiction under the Judiciary Act. Accordingly, that case is then definitely authority for the rule that the state court had jurisdiction in a proper case to issue mandamus, inasmuch as, instead of directing the Ohio state court to dismiss for lack of jurisdiction to issue a writ to a federal agent, this Court affirmed the judgment dismissing after trial and on the merits the application for mandamus. Clearly the further opinion of this Court "that the said supreme court of the State of Ohio had no authority to issue a *mandamus* in this case", refers simply to the lack of merits "in this case" and not to the inaccurate opinion expressed by the headnote that: "A state court cannot issue a mandamus to an officer of the United States." All this is again made clear by Conway, J. (286 N. Y. at 514 *et seq.,* R. 42).

The *McClung* Stipulation of Facts was made by stipulation in the Ohio Court, which is on file with, and made a part of the records of this Court (286 N. Y. at 515, R. 43), and is printed as an Appendix to this brief (pp. 57-60, *infra*).

The pertinent facts contained in the Stipulation of Facts and some of the Conclusions of law necessarily resulting therefrom are set out in the dissenting opinion of Conway, J., in the New York Court of Appeals (286 N. Y. at 516, 517, R. 44, 45) as follows:

> "* * * As appears from the stipulation of facts, prior to McClung's attempt to have the Register enter his application, a part of the land in question had been duly sold by a former Register of an earlier land office in another district and a United States patent had been issued; another part had also been sold by the same Register and the purchaser had made full payment although he had not received his patent; and the remainder of the land had been sold at private sale in accordance with the law. Accordingly, no part of the land McClung was seeking to preempt was a part of the public domain at the time he made his application. It had ceased to be within the jurisdiction of the land office and was no longer subject to entry or to disposition by the land officers. The Register had no power or duty to do the act which McClung sought to force him to perform. (*Simmons* v. *Wagner*, 101 U. S. 260, 261, 262; *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U. S. 10, 17, 18.) For that reason no court, State or federal, *had power* to grant the relief sought in the *McClung* case. * * *"

In addition, McClung's application, as appears by the record in this Court, was made under the Act of Congress of May 10, 1800 (2 Stat. 73) governing the sale of Public Lands in the Northwest Territory prior to the organization in 1804 of the Zanesville Land Office. The sales of the different parcels of land had been made either prior to or in 1803, and a United States Patent had been issued in 1803 to the purchasers of a large part of the lands. McClung's application to the Register Silliman to make his "entry" was made in 1810.

In addition to the foregoing, the following conclusions from the stipulated facts are briefly stated, as completely adequate to overcome and distinguish the *McClung* case as authority for the Courts below and for Respondent, and to confirm its holding as sufficient authority for Petitioner:

(1) That the Act of May 10, 1800 (2 Stat. 73), under which McClung sought his mandamus, was not applicable to the question of the Register's immunity as a federal officer, since the lands in question had been removed from the jurisdiction of the land office and of the Register by prior auction sales under the Act and issuance of a patent or a final certificate of purchase to the several purchasers, who thus obtained complete legal title which could not be attacked in an action at law.

(2) McClung, under the Act, had no "right of entry" to these sold lands.

(3) The Register Silliman had no statutory right or power to act and had refused to act for lack of such power, and therefore could not claim that he had exercised any "authority" under, or derived any immunity from an applicable statute.

(4) As the act was not applicable and was not applied, no federal question of the Register's immunity thereunder from the jurisdiction of the Ohio court was properly before this Court which, under the 25th Section of the Judiciary Act of 1789, had no appellate jurisdiction to pass upon the immunity of the defendant, as a federal officer, from the jurisdiction of the Ohio court (see cases on page 19 of Petition for certiorari).

(5) As the defendant Silliman failed to take out a writ of error, he could not raise before this Court the question of his immunity from the jurisdiction of the Ohio court.

(6) McClung's writ of error, on the other hand, raised only the question of the validity of the prior sales under

the act and of the existence or non-existence of a right of entry on his part, and this Court had appellate jurisdiction under his writ only to pass on those questions.

(7) The prior paid-up purchasers of the lands in question were the real parties in interest, and McClung's mandamus proceeding was fatally defective because of his failure to include these purchasers, who were the legal owners of the titles, as parties defendant (*Brady* v. *Work*, 263 U. S. 435; *New Mexico* v. *Lane*, 234 U. S. 58; *Lichfield* v. *Register and Receiver*, 9 Wall. 575, 577-8; *Garfield* v. *Goldsby*, 211 U. S. 249, 261, 262).

Further, as indicated by Mr. Justice Johnson (6 Wheat. 605), McClung had an adequate and immediate remedy against the patentees for the portion of the lands west of the Muskingum by action at law in ejectment or for damages and, after the issuance of a patent, by a bill in equity against the patentees for the land east of the Muskingum. *Marquez* v. *Frisbie*, 101 U. S. 473, 474-6.

(See also pages 5-7 and 16-19 of annexed Petition for Certiorari; also dissenting opinion of Conway, J., 286 N. Y. at pages 514-522.)

In Conclusion

The foregoing brief adequately supports the Petition for Certiorari in respect of the controlling or exclusive ground given by the Courts below for the dismissal of the Petition, that is: the lack of jurisdiction in the Supreme Court of New York to issue an order in the nature of mandamus against Respondent, The Federal Reserve Bank of New York; and this brief also shows that there is no power in the customs authorities and Courts or any other Court having jurisdiction over the Respondent to grant petitioner the needed relief and to make Respondent a party to its proceedings, or to render against it any enforceable judgment (286 N. Y. at 524, 525; R. 50, 51 (fol. 53)). Inasmuch as the Supreme Court of the District of Columbia, while not having jurisdic-

tion over the Respondent, has been held to have jurisdiction to mandamus the Secretary of the Treasury, or a Tariff Commission, to comply with a mandatory ministerial provision of a Tariff Act (*Calf Leather Tanners' Ass'n* v. *Morgenthau,* 80 Fed. (2d) 536, *cert. den.* 297 U. S. 718; *United States* v. *U. S. Tariff Commission,* 6 F. (2d) 491, rev'd in 274 U. S. 106, on ground that case had become moot), there is no good reason why the New York Supreme Court, under its concurrent jurisdiction, should not have the same power to mandamus the Respondent.

The other grounds presented by Respondent's objections in point of law (R. 20 (fol. 28)), call for no consideration by this Court, as they will be properly disposed of by the Court of original jurisdiction on any trial, if this Court reverse and remand.

POINT FOUR

The order and judgment of the Supreme Court of the State of New York, as confirmed by the judgment of the Court of Appeals, denying petitioner's application for lack of jurisdiction to issue an order in the nature of mandamus running to respondent, requiring compliance with Section 522(c) of the Tariff Act of 1930, should be reversed and the proceedings remanded to the Supreme Court of the State of New York with the direction to hear and decide the proceedings upon the merits.

Respectfully submitted,

LARKIN, RATHBONE & PERRY,
Attorneys for Petitioner-Appellant.

HERSEY EGGINTON,
GEORGE D. MUMFORD,
of Counsel.

Appendix

Stipulation of Facts from the Record in the Supreme Court of the United States in McClung v. Silliman, 6 Wheaton 598

(State of Ohio, Muskingum County)

Supreme Court October Term 1815

Monday 16th inst.

William McClung

vs.

Wyllis Silliman
Register of land office

Upon a rule to show cause why a mandamus should not be issued. By consent of the parties this rule is enlarged till tomorrow morning.—Supreme court October term 1815. Nineteenth Ins.

On motion for a rule to show cause why a mandamus should not issue against him to compel him to admit the entries of the application in the order of the last term made in this cause. It is agreed between the parties that on the second of August one thousand and eight hundred and ten the applicant regularly applied to the defendant to make entry of his application for entire section number Six Township twelve, Range thirteen, with the fraction number five same Township and range lying north of said section, also for entire section number twelve with the fraction number one north thereof in the township numbered sixteen Range fourteen, and produced the receivers receipts for the 1/20 part of the purchase money of each. That the defendant refuses to enter the said application,—first, because the said lands had been before sold at Marietta except that part of section number six lying east of the river, prior to

the time of the establishment of the land office of Zanesville and prior to the erection of the Zanesville district—second, because if not sold the said tracts had never been offered at Publick sale in the Zanesville district—third, because the part of number six lying east of the River had before the time of the plaintiffs application been offered for sale at Publick auction at Zanesville and afterwards and before such application had been sold at private sale according to law and was sold singly as fraction, and was one of the sales of fractions made according to the secretary's order, pursuant to the act of eighteen hundred and four. The parties agree as part of this case the Platt hereto annexed with all the notes, letters and figures thereon. They further agree that section twelve and the part of section six lying west of the river Muskingum, also the part of fraction number five lying west of the said river and the fraction number one, all appearing on the said Platt were sold together to Increase Mathews and Levi Whipple at the Publick sales at Marietta in the year eighteen hundred and one, for which a patent issued to Increase Mathews Levi Whipple & Rufus Putnam, dated the twenty first day of February one thousand eight hundred and three which Patent hereto annexed is agreed as part of this case.—They further agree that the fraction number five appearing on the said Platt was sold as a fraction united with another tract lying due east of it, and contained by the lines of the South Military boundary lines the north of said fraction, each produced east three hundred and four Poles and a line from these points parallel with the eastern Boundary of the said fraction number five was sold at Marietta to John McIntire together with that part or fraction number one which lies east of the Muskingum river by the description of east fraction number one, who has made full payment therefor but has not received his patent—the last purchase above mentioned was made in January one thousand eight hundred and three.—

The Parties further agree, the colours on said Platt to be true representations of the river Muskingum Licking and Zanes' Grant which was made in May one thousand seven hundred and ninety six by a law of that date. The parties agree that the river aforesaid is a navigable stream. The sales above stated to have been made at Marietta were returned by the surveyor General to the Zanesville office in one thousand eight hundred and four, before they proceeded to do business as having been sold at Marietta and therefore were never offered at Publick sale in the Zanesville District—they further agree that the surveyor General in executing the surveys of the publick lands Northwest of the river Ohio and above the mouth of the Kentucky river, returned the same from the south boundary of the Military lands appearing on the said Platts down to the Ohio company's purchase on the official platts all along the river in the manner appearing on the platts annexed in the entire townships numbered as such intersected by the river and has divided the townships intersected into entire sections, crossing the river, shewing the distance of each from its east and from its west boundary to the river, and distance, across the river and in the return of the quantity of each section intersected deducting the area of the river bed and describing the quantity of each tract on the different sides of the river in the manner appearing on the said Platt annexed which so far as the same goes is a true copy from the surveyor Generals record. The parties further agree that the sale of the property contained in the said patent made part of this case was made in Marietta in one entire Sale under the direction of the Surveyor General and the Governor of the Territory—they further agree that the section four being the tract before described lying east of the said fraction number five lies on the North side of the Township containing it, and is bounded on the north by the south bounds of the United States Military tract. They

agree that this agreed case shall not be considered on the defendants part as a waiver of the question of Jurisdiction, and that the case be now considered as on a motion for a preemptory Mandamus waiving preliminary proceedings. The parties further agree, that altho the law establishing the Zanesville district passed in March one thousand eight hundred and three, an office was not opened there until the twenty first day of May one thousand eight hundred and four.—And they lastly agree that all the official Platts and notes thereon or accompanying the platts now filed in the office of the treasury Department of the seventh Ranges and of the lands northwest of the river Ohio and above the mouth of Kentucky river be considered as parts of this case and to be referred to, by either party, in the Supreme court of the United States if this case shall be taken to that court without being copied into the record of this court.

FEB 28 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 928

IN THE MATTER OF

ARMAND SCHMOLL, INC., *Petitioner,*

v.

THE FEDERAL RESERVE BANK OF NEW YORK, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK

BRIEF FOR THE RESPONDENT IN OPPOSITION

ALLEN T. KLOTS,
Counsel for Respondent,
32 Liberty Street,
New York, N. Y.

WALTER S. LOGAN,
G. SCHUYLER TARBELL, JR.,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 928

IN THE MATTER OF

ARMAND SCHMOLL, INC., *Petitioner,*

v.

THE FEDERAL RESERVE BANK OF NEW YORK, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinions Below

The opinion of Mr. Justice Samuel I. Rosenman, rendered at Special Term, Part I, of the Supreme Court of New York, New York County, on June 12, 1939 (R. 28-29), is not officially reported. Mr. Justice Rosenman's decision was unanimously affirmed by the Appellate Division of the Supreme Court, First Department, without opinion, 260 App. Div. 912 (R. 32), on November 8, 1940. The Appellate Division granted leave to appeal to the New York Court of Appeals, 260 App. Div. 1006 (R. 32-33), which thereafter

affirmed the decision below. The opinion of the Court of Appeals (R. 34-51), rendered October 16, 1941, is reported in 286 N. Y. 503.

Jurisdiction

The order of the Supreme Court of New York on remittitur from the Court of Appeals was entered October 21, 1941 (R. 53). The petition for a writ of certiorari was filed February 6, 1942, time to apply for such writ having been extended by orders of this Court to February 7, 1942. The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925.

Respondent suggests that the basis for invoking the jurisdiction of this Court has not been established because it does not appear affirmatively from the record that a Federal question was actually decided by the New York Court of Appeals or that the judgment as rendered could not have been given without deciding it. The New York Court of Appeals is the ultimate authority as to what remedies are provided by the constitution and laws of New York State. The Court of Appeals has indicated in the prevailing opinion in this case, not only that it regarded as controlling the decisions of this Court to the effect that a State court does not have the power to mandamus a Federal officer, but also that it approved of this principle as a matter of governmental policy. The Court said (R. 37):

> "Assumption of such power would hamper orderly government and ignore the division of the fields of government of State and nation created by the Constitution."

Petitioner itself argues at page 50 of its brief that the question presented by the petition is in effect one of State law. The determination by the Court of Appeals of a question of State law is conclusive on all courts and peti-

tioner's contention that "This Court should say to the New York Supreme Court that it *must* determine and apply its own remedies" is fallacious. *Smith* v. *Adsit*, 16 Wall. 185, 189; *St. Louis, Iron Mountain and Southern Ry. Co.* v. *Taylor*, 210 U. S. 281, 285.

If, however, this Court should consider that a Federal question was necessarily decided by the New York Court of Appeals, the petition for a writ of certiorari in this case should be denied because the only question presented has heretofore been determined by this Court and the decision of the Court of Appeals is clearly in accord with applicable decisions of this Court which have stood over a period of many years without any express or implied dissent.

Statement

Section 522(c) of the Tariff Act of 1930 (Act of June 17, 1930, c. 497, Title IV; 46 Stat. 739; 31 U. S. C. A. § 372) provides that the Federal Reserve Bank of New York shall determine the buying rates in the New York market for cable transfers[1] payable in foreign currencies and, in any case where there are no market buying rates for such cable transfers, shall calculate such rates, and shall certify such buying rates daily to the Secretary of the Treasury who shall make them public at such times and to such extent as he deems necessary. Such rates are certified for use in converting foreign currency into currency of the United States for the purpose of the assessment and collection of duties upon merchandise imported into the United States.

On certain dates in 1935 and 1936, the Federal Reserve Bank of New York, acting under Section 522 of the Tariff Act of 1930, certified to the Secretary of the Treasury cer-

[1] A "cable transfer" may be defined as an order transmitted by cable to pay a certain sum of money to a designated payee. Djorup, "Foreign Exchange Accounting" 1926, ed., p. 44; *Oshinsky* v. *Taylor*, 172 N. Y. Supp. 231, 232 (App. Term 1st Dept. 1918); and see *Strohmeyer & Arpe Co.* v. *Guaranty Trust Co.*, 172 App. Div. 16, 19 (1st Dept. 1916).

tain rates of exchange for Brazilian milreis, which rates were published by the Secretary of the Treasury in Treasury Decisions 48064, 48100 and 48155 and were used by the Collector of Customs at the Port of New York, pursuant to this Section, in assessing the customs duties upon hides imported by the petitioner from Brazil. In March 1939 the petitioner sought to obtain an order of the courts of the State of New York in the nature of a writ of mandamus directing the bank to certify *nunc pro tunc* new and different rates of exchange for the milreis on the dates in question. Respondent did not answer the petition but applied for an order under Section 1293 of the New York Civil Practice Act dismissing the petition on four specific objections in point of law (R. 19-20). Although the properly pleaded statements of fact set forth in the petition were deemed admitted for the purpose of such application, the many conclusions of law and characterizations of respondent's acts which are included in the petition were not, of course, to be taken as true.

The New York Court of Appeals has affirmed the order dismissing the petition and held that the New York courts do not have jurisdiction of the subject of such a proceeding.

Question Presented

The only question presented is whether the courts of the State of New York have jurisdiction to direct or control by mandamus the performance by Federal Reserve Bank of New York, acting as a Federal agency, of its specific governmental function under Section 522(c) of the Tariff Act of 1930.

Statutes Involved

Section 522 of the Tariff Act of 1930 (Act of June 17, 1930, c. 497, Title IV; 46 Stat. 739; 31 U. S. C. A. § 372) is printed at pages 26-27 of the Petition for Writ of Certiorari, and at pages 6-7 of the Transcript of Record.

Argument

The only question here presented has heretofore been unequivocally determined by this Court, and the decision of the Court of Appeals of New York in this case is in complete accord with the applicable decisions of this Court.

POINT I

This Court has ruled conclusively that a governmental function such as that imposed upon respondent by Section 522(c) of the Tariff Act of 1930 may not be directed or controlled by a State Court.

The Constitution vests exclusively in Congress the power to impose customs duties and the power to regulate the value of foreign coin in terms of money of the United States (Art. I, §§8, 10). In order that the value of imported merchandise expressed in currencies of foreign countries may be converted into currency of the United States for the purpose of the assessment and collection of customs duties, Congress by Section 522 of the Tariff Act of 1930 has directed the Federal Reserve Bank of New York to determine the rates of exchange of the respective currencies of foreign countries daily and to certify such rates to the Secretary of the Treasury. In determining and certifying such rates, therefore, respondent is performing a governmental function pursuant to express direction of Congress in a field in which the Federal Government has exclusive jurisdiction.

This Court has decisively and consistently held that performance of such a function by a Federal agency may not be directed or controlled by a State court. This was first decided in the leading case of *M'Clung* v. *Silliman*, 6 Wheat. 598. The headnote gives the holding of that case as clearly as it could possibly be stated:

> "A State Court cannot issue a mandamus to an officer of the United States."

This decision has been repeatedly followed by this and other courts.

Tarble's Case, 13 Wall. 397 (1872);
Ex Parte Shockley, 17 F. (2d) 133 (D. C. N. D. Ohio 1926);
State ex rel. Wilcox v. *Curtis,* 35 Conn. 374 (1866);
Hinkle v. *Town of Franklin,* 118 W. Va. 586, 191 S. E. 291 (1937);
Goldstein v. *Somervell,* 170 Misc. 602, 10 N. Y. S. 2d 747 (1939);

See

Kendall v. *United States,* 12 Peters 524, 617 (1838);
Territory v. *Lockwood,* 3 Wall. 236, 239 (1866);
In re Blake, 175 U. S. 114, 119 (1899);
United States v. *Owlett,* 15 F. Supp. 736 (1936).

No case has been cited by the petitioner in any of the courts during any stage of this proceeding which has disputed its authority.

The authority of the *M'Clung* case has been consistently recognized and approved by writers of authoritative legal texts. *Willoughby on The Constitutional Law of the United States,* 1929 Edition, Volume I, page 201, says:

> "That a State court has no power to issue a mandamus or writ of certiorari to a Federal officer is not questioned."

See also

Merrill on Mandamus, p. 271;
High on Extraordinary Legal Remedies, (3d ed. 1896) p. 107;
Spelling on Injunctions and Other Extraordinary Remedies, (2d ed. 1901) p. 1268;
Rottschaefer on Constitutional Law, (1939) pp. 111-115.

The petitioner, in an elaborate discussion, undertakes to show that this point was not involved in the Court's holding

and that if it was involved it was a moot question. Any such contention is completely disproved by the unequivocal statement of this Court in *Kendall* v. *United States*, 12 Peters 524, at 617, that in the *M'Clung* case—

> "the only question directly before the Court was, whether a state court had authority to issue a mandamus to an officer of the United States, and this power was denied."

Moreover the mere reading of the opinion in the *M'Clung* case is a complete answer to the petitioner's argument. The majority of the Court of Appeals in its opinion by Chief Judge Lehman gives an analysis of that decision which needs no amplification. Twelve New York judges, including the Special Term judge, five judges in the Appellate Division, and six in the Court of Appeals, who heard this case, evidently concurred in this interpretation of the decision in *M'Clung* v. *Silliman*. So far as we know, only the one dissenting judge in the Court of Appeals and the petitioner have ever expressed a contrary view.

The principle of the *M'Clung* case applies even though the duty of the Federal agent is merely ministerial. In that case this Court clearly indicated that it regarded the duties of the register as ministerial by reference at three points in its opinion to "ministerial officers" (6 Wheaton 599, 600 and 605). Petitioner's repeated characterizations of the duties of respondent in this case as ministerial are therefore wholly immaterial. It seems clear, however, that the duties imposed upon respondent by Section 522(c) of the Tariff Act are not ministerial but require the exercise of judgment, discretion and special knowledge.

There is even more reason today for sustaining the principle laid down by *M'Clung* v. *Silliman* than there was at the time that case was decided. With the ever-increasing number of activities of the Federal Government, with the increase of its departments, bureaus and administrative agencies, utter confusion would result if every State court

in the land could undertake to mandamus Federal officials in the performance of their duties. Certainly no public policy requires a reversal of the principle today. Lehman, Ch. J., succinctly summarized the principle in the last paragraph of his opinion in this case (R. 37):

> "No case has been cited which holds that a State court may go outside that field and control the manner in which a federal agency performs or attempts to perform its functions and duties under the Tariff Act or other federal statute where the Federal government has exclusive jurisdiction. Assumption of such power would hamper orderly government and ignore the division of the fields of government of State and nation created by the Constitution. * * * "

POINT II

In view of the system of customs courts set up by Congress, there is particular reason for not permitting a State court to issue mandamus in this case.

Congress, of course, has exclusive jurisdiction with respect to tariff matters. Congress has set up a comprehensive system of customs courts. (Act of Oct. 10, 1940, c. 843, § 1, 54 Stat. 1101; 28 U. S. C. A. § 296; Act of June 17, 1930, c. 497, Title IV, §§ 514, 515; 46 Stat. 734; 19 U. S. C. A. §§ 1514, 1515; Act of March 3, 1911, c. 231, § 188, 36 Stat. 1143, as amended; 28 U. S. C. A. § 301; Act of August 5, 1909, c. 6, § 28, 36 Stat. 91, 105, as amended; 28 U. S. C. A. § 308.) Their jurisdiction over the administration of matters relating to customs appears to be exclusive. *Patchogue-Plymouth Mills Corporation* v. *Durning,* 101 F. (2d) 41 (C. C. A. 2d 1939); *Cottman Co.* v. *Dailey,* 94 F. (2d) 85, 88 (C. C. A. 4th 1938); *Riccomini* v. *United States,* 69 F. (2d) 480, 484 (C. C. A. 9th 1934); *Gulbenkian* v. *United States,* 186 Fed. 133, 135 (C. C. A. 2d 1911); *Nichols* v. *United States,* 7 Wall. 122, 129-131 (1869). Whether the jurisdiction of such courts is exclusive or not, the remedies

obviously intended to be afforded by them are so broad as to leave no basis for permitting the State courts to invoke the extraordinary remedy of mandamus. It is not only an elementary principle of law, but it is expressly provided in the New York statute, that mandamus cannot be resorted to if the determination can be adequately reviewed by some other court, body or officer (New York Civil Practice Act §1285).

POINT III

Petitioner's claim that if mandamus is not afforded by the State court no other remedy is available is no valid reason for granting this certiorari.

As we have pointed out, the jurisdiction of the customs courts in administering tariff matters is exceedingly broad. They are expressly given jurisdiction to review the validity of any orders or findings entering into the assessment of customs duties (Act of June 17, 1930, c. 497, Title IV, §§ 514, 515; 46 Stat. 734; 19 U. S. C. A. §§ 1514, 1515). The petitioner contends, however, that its only adequate remedy is in the State court. It asserts that the customs courts have no jurisdiction to consider the validity of the rates certified by respondent. There are, to be sure, decisions to the effect that a determination by an executive agency of the rate of exchange entering into a customs assessment is a matter that is nonjusticiable. But these decisions are to the effect that such a determination is nonjusticiable in any court.

Cramer v. *Arthur*, 102 U. S. 612, 616-617 (1880);
Hadden v. *Merritt*, 115 U. S. 25 (1885);
United States v. *Klingenberg*, 153 U. S. 93 (1894);
Amalgamated Textiles, Ltd. v. *United States*, 84 F. (2d) 210 (Cust. & Pat. App. 1936);
J. S. Staedtler, Inc. v. *United States*, T. D. 49255, 25 C. C. P. A. 136 (1937).

A determination which is nonjusticiable may not be reviewed whether the question is presented in a customs court or in a mandamus proceeding in a State court.

POINT IV

The authorities relied upon by petitioner are not in point.

This case is governed by the principle embodied in *M'Clung* v. *Silliman*. The authorities cited by petitioner have no bearing on that principle and are clearly distinguishable from the case at bar. *Armand Schmoll, Inc.* v. *The Federal Reserve Bank of New York*, 286 N. Y. 503, at 508-509 (R. 36-37).

Cases cited by petitioner hold that an action may be brought either in the State or in the Federal courts to enforce private rights created by Federal statute against a person performing no governmental function.[2] This case does not involve such a right. It involves a governmental function conferred by Congress upon an agency of the Federal Government, and none of the cases cited by petitioner even intimates that such a function may be the subject of a mandatory decree of a State court.

Cases involving the jurisdiction of State courts of a quo warranto proceeding[3] to test the right of national banks

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[2] *Claflin* v. *Houseman*, 93 U. S. 130; *Second Employers Liability Cases*, 223 U. S. 1; *Minn. & St. Louis R. R.* v. *Bombolis*, 241 U. S. 211; *St. Louis B. & M. Ry. Co.* v. *Taylor*, 266 U. S. 200; *Galveston etc. Ry. Co.* v. *Wallace*, 223 U. S. 481; *Panama R. R. Co.* v. *Vasquez*, 271 U. S. 557; *Hines* v. *Lowrey*, 305 U. S. 85; *People* v. *Welch*, 141 N. Y. 266; *Guthrie* v. *Harkness*, 199 U. S. 148; *Matter of Tuttle* v. *Iron National Bank*, 170 N. Y. 9; *Matter of Hurley* v. *National Bank of Middletown*, 252 App. Div. 272; *People ex rel. Lorge* v. *Consolidated National Bank*, 105 App. Div. 409; *Murray* v. *Walker*, 156 Ky. 536.

[3] *First National Bank* v. *Union Trust Co.*, 244 U. S. 416, 428.

to exercise fiduciary powers as provided in Section 11(k) of the Federal Reserve Act (Act of December 23, 1913, ch. 6, § 11(k); 38 Stat. 251, 262; 12 U. S. C. A. § 248), do not involve any governmental functions of national banks; and are distinguishable also on the ground that the statute permits national banks to exercise such powers only "when not in contravention of state or local law." The question in such cases is, as pointed out by this Court in the very case cited by petitioner, one of State law intended by Congress to be determined in the State courts.

Cases holding that State courts have jurisdiction to give redress for wrongs committed by Federal officers or agents claiming to act under authority granted by Federal statute,[4] or to prevent Federal officers or agents from going outside their Federal statutory authority and jurisdiction,[5] are clearly distinguishable from *M'Clung* v. *Silliman* and from the case at bar. In each of the cases falling in those categories the action of the State court was directed solely at the defendant's acts as an individual outside the scope of his Federal authority, and in no case did the court purport to assume jurisdiction over the acts of the defendant as a Federal officer or agent. In the *M'Clung* case and in the case at bar, on the other hand, the very hypothesis upon which the State court's power was invoked was that the act sought to be directed by order of the State court was an act which respondent should perform within its authority as a Federal instrumentality.

Cases holding that a mandamus proceeding against the holder of a public office abates upon the death or resignation of such officer,[6] do not support petitioner's assertion that

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[4] *Bates* v. *Clark*, 95 U. S. 204; *United States* v. *Lee*, 106 U. S. 196, *Teal* v. *Felton*, 12 How. 284; *Gelston* v. *Hoyt*, 3 Wheat. 246; *De Lima* v. *Bidwell*, 182 U. S. 1; *In re Fassett*, 142 U. S. 479; *Schall* v. *Newton*, 217 App. Div. 171, aff'd 245 N. Y. 576.

[5] *Northern Pacific Ry. Co. and Walker D. Hines, Director General of Railroads* v. *North Dakota*, 250 U. S. 135.

[6] *United States* v. *Boutwell*, 17 Wall. 604; *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28; *Pullman Co.* v. *Croom*, 231 U. S. 571.

this proceeding was not directed against respondent in its official capacity. The order sought in the case at bar would necessarily be directed to respondent in its capacity as agent of the Federal Government because it would require official performance of respondent's statutory duty. By the same token, any order of the State court directing respondent *nunc pro tunc* to certify new and different rates for Brazilian milreis on the dates in question, and therefore disregarding or annulling the action already taken by respondent in discharge of its statutory duty, would clearly constitute a direction of the manner of performance of that duty.

Cases in which petitioner claims Federal courts have issued the writ of mandamus to State officers or agents are not in point.[7] Those cases held simply that where under State practice the recognized method of enforcing a judgment obtained in a State court against a municipality was by mandamus directing an officer to levy a tax to pay the judgment, a nonresident suitor who obtained judgment against a municipality in a Federal court sitting in that State was entitled under the Acts of Congress (1 Stat. 93, 276; 4 Stat. 274; 5 Stat. 499, 789) to the same means of execution. *Amy* v. *The Supervisors*, 11 Wall. 136 (1870); *In re Copenhaver*, 54 Fed. 660 (D. C. W. D. Mo. 1893); *Riggs* v. *Johnson County*, 6 Wall. 166, at 197-198 (1867); *Defoe* v. *Town of Rutherfordton*, 122 F. (2d) 342 (C. C. A. 4th 1941); *Mayor, etc., of The City of Helena* v. *United States ex rel. Helena Waterworks Co.*, 104 Fed. 113, at 117 (C. C. A. 9th 1900). The cases stand for no such broad rule as petitioner contends. *Merrill on Mandamus*, §219.

Section 4 of the Federal Reserve Act (Act of December 23, 1913, ch. 6, §4, 38 Stat. 251; 12 U. S. C. A. §341)

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[7] *Riggs* v. *Johnson County*, 6 Wall. 166; *Supervisors* v. *United States*, 4 Wall. 435; *Von Hoffman* v. *City of Quincy*, 4 Wall. 535; *U. S. ex rel. Ranger* v. *New Orleans*, 98 U. S. 381; *Mobile* v. *Watson*, 116 U. S. 289; *Marion County Court* v. *Huidekoper*, 134 U. S. 332; *Arkansas* v. *St. Louis-S. F. Ry. Co.*, 269 U. S. 172.

which permits respondent and the other Federal Reserve Banks "To sue and be sued, complain and defend, in any court of law or equity", gives to the courts of the State of New York jurisdiction over the *person* of the Federal Reserve Bank of New York in a proper case. It does not, however, invest such courts with jurisdiction over an action or proceeding against the Federal Reserve Bank of New York involving a *subject matter* which is not within their jurisdiction. In an action in a State court to mandamus a Federal agency to perform a Federal function, the court may very well have jurisdiction over the person of the agency but its disability to act arises because of its lack of jurisdiction of the subject matter of the proceeding.

Conclusion

It is respectfully submitted that this Court has not been shown to have jurisdiction to review the decision of the New York Court of Appeals in this case. Even if this Court were shown to have jurisdiction, however, the petition for a writ of certiorari to the Supreme Court of New York should be denied because the decision of the Courts below is clearly in accord with the applicable decisions of this Court.

Respectfully submitted,

ALLEN T. KLOTS,
Counsel for Respondent.

WALTER S. LOGAN,
G. SCHUYLER TARBELL, JR.,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 928

ARMAND SCHMOLL, INC., PETITIONER

v.

THE FEDERAL RESERVE BANK OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

MEMORANDUM FOR THE UNITED STATES, AMICUS CURIAE

INTEREST OF THE UNITED STATES

This action, in the nature of mandamus, was instituted in the Supreme Court of the State of New York by petitioner for an order directing the respondent, Federal Reserve Bank of New York, to certify to the Secretary of the Treasury, as the value of Brazilian milreis in terms of United States currency on certain dates, the New York market buying rates on those dates for cable transfers payable in Brazilian milreis, in accordance with Section 522 of the Tariff

Act of 1930. The certification of such rates by the Federal Reserve Bank is a governmental function regulated by the statutes of the United States. Accordingly, the Government appeared *amicus curiae* in the courts below to question the jurisdiction of a state court to control the performance of governmental duties by an officer or agency of the United States. It is for the same reason that the United States files this memorandum.

OPINIONS BELOW

The memorandum opinion of the Supreme Court of New York (R. 28–29) is not reported. The order of the Appellate Division (R. 32) was entered without opinion. The opinion of the Court of Appeals of New York (R. 34–52) is reported in 286 N. Y. 503.

JURISDICTION

The order of the Court of Appeals of New York was entered on October 17, 1941 (R. 52–53). The order of the Supreme Court of New York, on remittitur from the Court of Appeals, was entered on October 21, 1941 (R. 53–54). The time within which to file a petition for a writ of certiorari was extended by Mr. Justice Jackson to February 3, 1942 (R. 54), and finally to February 7, 1942 (R. 55). The petition for a writ of certiorari was filed on February 7, 1942.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a state court has power to issue mandamus to a federal instrumentality to control the performance of its governmental duties under federal law.

STATUTE INVOLVED

The applicable portions of Section 522 of the Tariff Act of 1930, 46 Stat. 739, 31 U. S. C., Sec. 372, and of Section 4 of the Federal Reserve Act of 1913, 38 Stat. 254, 12 U. S. C., Sec. 341, are set forth in the Appendix, *infra,* pp. 13–14.

STATEMENT

Section 522 (a) of the Tariff Act of 1930 provides that the value of foreign coin in terms of United States money shall be estimated by the Director of the Mint and proclaimed by the Secretary of the Treasury quarterly. Section 522 (b) provides that the value so proclaimed shall, except as provided in Section 522 (c), be the basis for converting foreign currency into United States currency whenever necessary for the assessment and collection of import duties. Section 522 (c) provides:

> If no such value has been proclaimed or if the value so proclaimed varies by 5 percentum or more from a value measured by the buying rate in the New York market at noon on the day of exportation, conversion shall be made at a value measured by such buying rate. * * * For the purposes of this subdivision such buying rate shall be the

> buying rate for cable transfers payable in foreign currency so to be converted; and shall be determined by the Federal Reserve Bank of New York and certified daily to the Secretary of the Treasury, who shall make it public at such times and to such extent as he deems necessary.

On March 23, 1938, petitioner commenced this proceeding, in the nature of mandamus, in the Supreme Court of New York, New York County, alleging facts which may be summarized as follows:

During January and February 1936 petitioner lawfully imported into the United States certain cattle hides which had been exported from Brazil on December 19, 1935, January 15, 1936, and February 8, 1936 (R. 5). The Collector of Customs, acting within his authority, caused the hides to be appraised, as of the respective dates of exportation, in Brazilian milreis and thereafter converted the appraised value into United States currency and liquidated the duty on the hides at 10 per cent of the converted value (R. 6). In such conversion the Collector used $.083916, $.084200, and $.084700, respectively, as the rate of exchange on each of the three export dates (R. 8, 15). In accordance with Section 522 (c) these rates had been certified by respondent to the Secretary of the Treasury as the buying rates for cable transfers payable in Brazilian milreis, each being certified as "Nominal rate. Firm rates not available" (R. 7-8). Each varied more than 5 per

cent from the rates proclaimed by the Secretary of the Treasury under Section 522 (a) so that the Collector of Customs used the rates certified by respondent to the Secretary in converting the appraised value of the hides (R. 8).

Petitioner also alleged that throughout the months of December 1935 and January and February of 1936 there was an established foreign exchange market in which there were dealings in cable transfers payable in Brazilian milreis and in which firm quotations of the buying rates for such cable transfers were obtainable, the rates on the days in question being $.0555, $.0560, and $.0585 per milreis, respectively (R. 8–9), but that respondent, in complete disregard of Section 522 (c) did not take these sources into consideration when certifying the rates to the Secretary of the Treasury so that the rates certified exceeded the actual rates by 40 percent and were arbitrary, illegal and void (R. 10–11). The liquidation made by the Collector had been set aside on other grounds, it was averred, but the rates certified by respondent would be used by the Collector when the customs duties were finally liquidated so that excess duties of approximately 40 percent would be imposed (R. 12). The petition concluded that petitioner had no other remedy for respondent's refusal to make a new certificate (R. 12–14) and prayed (R. 14):

> That an order be granted directing the defendant to determine and certify to the

> Secretary of the Treasury nunc pro tunc as the value of Brazilian milreis * * * on December 19, 1935, January 15, 1936, and February 8, 1936, the New York market buying rates on said dates for cable transfers payable in Brazilian milreis in terms of currency of the United States, in accordance with the requirements of Section 522 * * *.

Respondent filed, in accordance with local practice, a "Notice of Objections in Point of Law" asking that the petition be dismissed on the grounds (1) that the court is without jurisdiction of the subject-matter, (2) that the petition does not state facts entitling petitioner to relief, (3) that the proceeding was not filed in time, and (4) that the certification can be reviewed by appeal to a court or to some other body or officer (R. 19–20).

The application to dismiss the petition was granted (R. 23–27), and on motion for resettlement of the order of dismissal (R. 23–27) the application was granted "as matter of law only, viz., upon the ground that this Court has not jurisdiction of the subject of this proceeding, and not upon the ground of the exercise of the discretion of the Supreme Court" (R. 4).

On appeal to the Appellate Division of the Supreme Court of New York, First Department (R. 1–2), the order of dismissal was affirmed (R. 32). On appeal to the Court of Appeals of New York (R. 31), the order of the Appellate Division was

affirmed (R. 52–53). The Court of Appeals held (R. 34–37) that the Federal Reserve Bank was a federal agency exercising powers and performing duties imposed by federal statute, and that a state court may not control the manner in which a federal agency performs its functions "under the Tariff Act or other federal statute where the Federal government has exclusive jurisdiction" (R. 37). One judge dissented (R. 37–52).

ARGUMENT

The decision below follows settled principle. This Court early held that state courts are without power to mandamus a federal officer. *McClung* v. *Silliman,* 6 Wheat. 598; see also *In re Blake,* 175 U. S. 114, 119; *Territory* v. *Lockwood,* 3 Wall. 236, 239; *Ex parte Shockley,* 17 F. (2d) 133, 137 (N. D. Ohio); *Hinkle* v. *Town of Franklin,* 118 W. Va. 585, 586. The respondent's corporate authority "to sue and be sued * * * in any court of law or equity" affords no basis of distinction; the rule of the *McClung* case is not based on the government's immunity from suit,[1] but on the principle that the conduct of a federal officer, "can only be controlled by the power that created him." 6

[1] Federal Reserve Act of 1913, 38 Stat. 254, 12 U. S. C., Sec. 341.

An action of mandamus to compel performance of a ministerial duty of a federal officer has been held not to be a suit against the United States. *Board of Liquidation* v. *McComb,* 92 U. S. 531, 541; *Minnesota* v. *Hitchcock,* 185 U. S. 373, 386; *Houston* v. *Ormes,* 252 U. S. 469, 472–473.

Wheat. 598 at 604–605; cf. *Tarble's Case,* 13 Wall. 397, 410–411 (*habeas corpus*); *Territory* v. *Lockwood,* 3 Wall. 236, 239–240 (*quo warranto*). The cases of *Federal Housing Authority* v. *Burr,* 309 U. S. 242, and *Federal Land Bank* v. *Priddy,* 295 U. S. 229, holding that federal instrumentalities authorized "to sue and be sued" are subject to garnishment and attachment on money claims, are distinguishable for the same reason; they do not even remotely suggest that state courts may control by mandamus the performance of federal functions entrusted to such agencies.

The petitioner's novel suggestion (Br. pp. 51–55) that the *McClung* case passed only on the merits of the particular claim for relief and that the Court was without power to decide the jurisdictional issue, is in the teeth of the opinion and mandate.[2] The "only question directly before the Court, was, whether a state court had

[2] The Court, after noting that the state court had affirmed its own jurisdiction but had denied relief on the merits and that both parties were thus interested in sustaining the decision on the jurisdictional issue (6 Wheat. at 602), concluded that it was "sanctioned, in referring the decision of the state court, in this case, to the ground on which it ought to have been made, instead of that on which it appears to have been made," and expressly placed its decision upon the sole ground that the state tribunal was without jurisdiction. *Id.*, 604–605. The mandate (*id.*, 605) of affirmance without directions to dismiss is not ambiguous in view of the statement included therein that the state court had "no authority" to issue a mandamus (*id.* 605), and any supposed ambiguity is removed by the unequivocal terms of the opinion.

authority to issue a *mandamus* to an officer of the United States, and this power was denied." *Kendall* v. *United States,* 12 Pet. 524, 617. That this was the import of the decision has never heretofore been doubted. See *Territory* v. *Lockwood,* 3 Wall. 236, 239; *In re Blake,* 175 U. S. 114, 119; *Ex parte Shockley,* 17 F. (2d) 133, 137 (N. D. Ohio); *Hinkle* v. *Town of Franklin,* 118 W. Va. 585, 586.

The rule of the *McClung* case has been accepted as settled doctrine for more than a century (see cases cited, *supra*) and has become deeply imbedded in American jurisprudence. Cf. *Tarble's Case,* 13 Wall. 397, 410–411 (*habeas corpus*); *Territory* v. *Lockwood,* 3 Wall. 236, 239–240 (*quo warranto*). See also authorities collected in *Brooks* v. *Dewar,* No. 718, October Term, 1940, Brief for the Petitioner, pp. 35–39. Nothing in the cases cited by petitioner or in the principles which they announce provides any occasion for reconsidering the rule at this time. Of the cases cited, those involving proceedings in state courts hold that such courts are not without jurisdiction merely because a cause of action arises under federal law;[3] that federal officers are subject

[3] *Claflin* v. *Houseman,* 93 U. S. 130 (suit by assignee in bankruptcy); *Second Employers' Liability Cases,* 223 U. S. 1 (Federal Employers Liability Act); *Galveston, etc. Ry. Co.* v. *Wallace,* 223 U. S. 481 (Carmack Amendment); *Minnesota & St. Louis R. R.* v. *Bombolis,* 241 U. S. 211 (Federal Employers Liability Act); *St. Louis B. & M. Ry. Co.* v. *Taylor,* 266 U. S. 200 (Carmack Amendment).

to actions for damages in state courts for private injuries arising out of conduct unauthorized by valid law;[4] and that certain federal instrumentalities engaged in commercial undertakings are subject to the control of state courts in the performance of duties imposed by state law.[5] Those aris-

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[4] *Gelston* v. *Hoyt*, 3 Wheat. 246, affirming 13 Johns. R. 141 (trespass against collector of customs for illegal seizure of vessel and cargo); *Teal* v. *Felton*, 12 How. 284, affirming 1 N. Y. 537 (trover against postmaster for refusal to deliver newspaper); *Bates* v. *Clark*, 95 U. S. 204 (trespass for illegal seizure of goods, instituted in territorial not state court); cf. *United States* v. *Lee*, 106 U. S. 196 (suit to recover possession of real estate instituted in state court and removed to federal court).

[5] *First National Bank* v. *Missouri*, 263 U. S. 640 (quo warranto); *First National Bank* v. *Union Trust Co.*, 244 U. S. 416 (quo warranto); *Guthrie* v. *Harkness*, 199 U. S. 148 (*mandamus*). In *North Dakota* v. *Northern Pacific Railway*, 250 U. S. 135, the proceeding in the state court to compel the Director General of the Railroads to charge rates prescribed by the local Utilities Commission was based on the ground that Section 10 of the Federal Control Act subjected the rates initiated by the President to review by the Interstate Commerce Commission, the jurisdiction of which was not theretofore exclusive of state authority in matters of intrastate rates, and that Section 15 expressly reserved to the states their existing police power. See 250 U. S. at 145–146, 148–159. The state court undoubtedly had jurisdiction to enforce the Director General's alleged duties under state law under the rule of *First National Bank* v. *Missouri*, *supra*, quite apart from the express provision of Section 10 of the Federal Control Act that "no defense shall be made * * * upon the ground that the carrier is an instrumentality or agency of the Federal Government." Jurisdiction was apparently expressly conceded by all the

ing in the federal courts are even more remote. One group involves mandamus of federal officers by the courts of the District of Columbia,[6] which were created of course under the laws of the United States and which were early held to have power to issue such writs under the Act of February 27, 1801, *Kendall* v. *United States,* 12 Pet. 524, 621–625. Others are instances of mandamus issued by federal courts, in conformity with state practice, to compel state officers to levy taxes to pay federal judgments—a procedure authorized by the Process Acts[7] after jurisdiction has been otherwise acquired.[8] And the remaining group sustains the issuance of federal injunctions to restrain state officers acting in violation of the supreme

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parties in the state courts (see 250 U. S. at 142), and was not controverted in this Court by the appellants. The question whether the action was one against the United States, mooted by way of anticipation in the brief filed as *amici curiae* by the several States and the National Association of Railway and Utilities Commissioners (p. 22) and discussed in the opinion of the Court (p. 152) is, as pointed out above, a separate and distinct issue.

[6] *Wilbur* v. *Krushnic*, 280 U. S. 306, 319; *Garfield* v. *Goldsby*, 211 U. S. 249, 261–2; *Lane* v. *Hoglund*, 244 U. S. 174; *Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638.

[7] 1 Stat. 93, 276; 4 Stat. 274; 5 Stat. 499, 789. Cf. Rev. Stat. sec. 914; F. R. C. P. 81 (b).

[8] *Riggs* v. *Johnson County*, 6 Wall. 166, 188 (73 U. S.); *United States ex rel. Ranger* v. *New Orleans*, 98 U. S. 381; *Mobile* v. *Watson*, 116 U. S. 289; *Marion County Court* v. *Huidekoper*, 134 U. S. 332; *Arkansas* v. *St. Louis-S. F. Ry. Co.*, 269 U. S. 172; *Bath County* v. *Amy*, 13 Wall. 244.

law of the land.[9] In none of these cases was the authority of *McClung* v. *Silliman* ever questioned or limited.

Whether other relief is available to petitioner need not be inquired. If not, it is only because Congress has seen fit to withhold power to issue mandamus from the federal courts outside the District of Columbia. The remedy, if any is desirable, lies with Congress rather than in overturning a principle followed for more than a century and subjecting federal functions to the directions of state courts.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

FRANCIS M. SHEA,
Assistant Attorney General.

MELVIN H. SIEGEL,
ELLIS LYONS,
Attorneys.

MARCH 1942.

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[9] *Allen* v. *Baltimore & O. R. R. Co.*, 114 U. S. 164; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 10, 13; *In re Tyler, Petitioner*, 149 U. S. 164; *Scott* v. *Donald*, 165 U. S. 107; *Reagan* v. *Farmers L. & T. Co.*, 154 U. S. 362; *Smythe* v. *Ames*, 169 U. S. 466; *Ex parte Young*, 209 U. S. 123, 155, 158–159.

APPENDIX

Tariff Act of 1930, Sec. 522, 46 Stat. 739, 31 U. S. C., Sec. 372:

(a) Value of Foreign Coin Proclaimed by Secretary of Treasury.—The value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated quarterly by the Director of the Mint and be proclaimed by the Secretary of the Treasury quarterly on the 1st day of January, April, July, and October in each year.

(b) Proclaimed Value Basis of Conversion.—For the purpose of the assessment and collection of duties upon merchandise imported into the United States on or after June 17, 1930, wherever it is necessary to convert foreign currency into currency of the United States, such conversion, except as provided in subdivision (c), shall be made at the values proclaimed by the Secretary of the Treasury under the provisions of paragraph (a) of this section, for the quarter in which the merchandise was exported.

(c) Market Rate When No Proclamation.—If no such value has been proclaimed, or if the value so proclaimed varies by 5 per centum or more from a value measured by the buying rate in the New York market at noon on the day of exportation, conversion shall be made at a value measured by

such buying rate. If the date of exportation falls upon a Sunday or holiday, then the buying rate at noon on the last preceding business day shall be used. For the purposes of this subdivision such buying rate shall be the buying rate for cable transfers payable in the foreign currency so to be converted; and shall be determined by the Federal Reserve Bank of New York and certified daily to the Secretary of the Treasury, who shall make it public at such times and to such extent as he deems necessary. In ascertaining such buying rate such Federal Reserve bank may in its discretion (1) take into consideration the last ascertainable transactions and quotations, whether direct or through exchange of other currencies, and (2) if there is no market buying rate for such cable transfers, calculate such rate from actual transactions and quotations in demand or time bills of exchange. (June 17, 1930, c. 497, Title IV, Sec. 522, 46 Stat. 739.)

Federal Reserve Act of 1913, Sec. 4, 38 Stat. 254, 12 U. S. C., Sec. 341:

> Upon filing of the organization certificate with the Comptroller of the Currency a Federal Reserve Bank shall become a body corporate and as such and in the name designated in such organization certificate shall have power—
>
> * * * * *
>
> Fourth. To sue and be sued, complain and defend in any court of law or equity.

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No. 928

IN THE MATTER

of

ARMAND SCHMOLL, INC.,
Petitioner and Appellant Below,

v.

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Respondent and Appellee Below.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

HERSEY EGGINTON,
Counsel for Petitioner.

HERSEY EGGINTON,
GEORGE D. MUMFORD,
of Counsel.

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PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

A reading of the dissenting opinion of Judge Conway (286 N. Y. at 509-525; R. 37-51) discloses the fact that the Respondent's claims have been completely met, and this is confirmed by Respondent's failure to attempt to deal with that opinion and its reasons.

The propositions advanced by Respondent in its Brief may be disposed of as follows:

As to this Court's jurisdiction (Respondent's Brief, pp. 2 and 3):

The record "affirmatively" shows and "the judgment as rendered could not have been given without deciding" ad-

versely Petitioner's rights under the Tariff Act of 1930 and without interpreting that federal statute. Respondent says: "The New York Court of Appeals is the ultimate authority as to what remedies are provided by the constitution and laws of New York State." Respondent is strangely inconsistent for it and the majority in the Court of Appeals insist that the state courts are without power and jurisdiction to remedy an acknowledged statutory violation and wrong solely because of the claimed conclusive decision of this Court in *McClung* v. *Silliman,* declaring as a matter of federal law the lack of jurisdiction of state courts. The interpretation and effect of the federal tariff act and the alleged denial by this Court of any power in the state courts to issue mandamus or other adequate remedy for the admitted violation of statutory duties, are obviously federal questions within this Court's jurisdiction. Jurisdiction follows "* * * a claim of a right or immunity under a statute of the United States." (*St. Louis & I. M. Ry. Co.* v. *Taylor,* 210 U. S. 281, 292, 293.)

Smith v. *Adsit,* 16 Wall. 185, cited at page 3 of Respondent's brief is not in point. It did not appear there that a federal question had been decided adversely to complainant. (See pp. 188, 189.) *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor,* 210 U. S. 281, 291-293, also cited, is flat authority in support of the jurisdiction of this Court in the instant case, this Court there saying:

> "Where a party to litigation in a state court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the State, then the question thus raised may be reviewed in this court."

A judgment of the highest state court dismissing a complaint for want of jurisdiction is conclusive upon the Federal Supreme Court, on writ of error, *unless the denial of*

a Federal right is involved. (*Dayton Coal & Iron Co.* v. *Cincinnati, N. O. & T. P. R. Co.,* 239 U. S. 446, 450.) Where, however, that decision is expressly rested upon the determination of the Federal question and not upon the inapplicability of the state law, the United States Supreme Court has jurisdiction. *Commonwealth of Virginia* v. *Imperial Coal Sales Co.* (1934), 293 U. S. 15, 16; *St. Louis I. M. & S. Ry. Co.* v. *Taylor,* 210 U. S. 281, 292, 293. In the *Virginia* case Mr. Chief Justice Hughes, writing for the Court, said (p. 16):

> "As the decision was thus expressly rested, not upon the inapplicability of the state law, but upon a determination of the Federal question by which the bar of the Federal Constitution was erected against the levy of the tax, this Court has jurisdiction. (28 U. S. C. 344B; *Henderson* v. *Henderson City,* 173 U. S. 592, 608, 609; *Rogers* v. *Hennepin County,* 240 U. S. 184, 188, 189; *Grayson* v. *Harris,* 267 U. S. 352, 358."

The correctness of the statement, on page 50 of Petitioner's brief, that "This Court should say to the New York Supreme Court that it *must* determine and apply its own remedies", excepted to by Respondent at page 3 of its Brief, is fully borne out by the decision and opinion of this Court in *Second Employers' Liability Cases,* 223 U. S. 1, at pages 55-59.

As to Respondent's "Statement" (Brief, pp. 3 and 4):

A reading of the Petition (R., pp. 5-19) will show that, contrary to Respondent's claim, there are not any or "many conclusions of law and characterizations of Respondent's acts which are included in the petition were not, of course, to be taken as true." The pleaded facts, admitted by Respondent's motion, show the continuous existence of a New York cable buying market, the possession by Respondent at all times of the actual rates and a disregard of its statutory duties by a wilful certification of rates grossly in excess of actual rates to the grave injury of Petitioner.

As to Respondent's "Question Presented" (Brief, p. 4):

Respondent's claim that the duty merely to report actual rates determined by the action of the New York market itself is a "specific governmental function under Section 522(c) of the Tariff Act of 1930," is unsound. (*Matter of Wicksel* v. *Cohen*, 262 N. Y. 446, 449; *Kansas City Southern Ry. Co.* v. *I. C. C.*, 252 U. S. 178, 187; *Continental Tie & Lumber Co.* v. *U. S.*, 286 U. S. 290, 295). This equivocal term "governmental function" cannot be used to convert a statutory ministerial act or duty, not involving the exercise of the political or sovereign power, into a duty protected from, or beyond the remedy of, any court, state or federal, and leave the political and voting power the only one to prevent abuse and violation. *Kendall* v. *United States*, 12 Pet. 524, 610, 614, 618. (Petitioner's Brief, pp. 46, 47, and Petition for Certiorari, pp. 14, 15, 18.)

In harping on the nature of the "governmental function" involved, the Respondent overlooks the essential fact that Section 522(c) also creates rights, enforceable under the common law in state courts, in favor of importers, as well as of the government, which are dependent upon the performance of the prescribed ministerial duty. *Amberg* v. *Kinley*, 214 N. Y. 531; *Schmidt* v. *Merchants Dispatch Transp. Co.*, 270 N. Y. 287, 305-6; *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33, 39. Where Congress creates a right and does not provide a remedy, it intends to leave the right to recover for its violation to be determined by the remedies provided by the state. (*Breisch* v. *Central Ry. of N. J.*, 312 U. S. 484, 486; *Gilvary* v. *Cuyahoga Valley Ry. Co.*, 292 U. S. 57, 61-62; *Moore* v. *Ches. & Ohio Ry. Co.*, 291 U. S. 205, 214, 215; *St. Louis B. & M. Ry. Co.* v. *Taylor*, 266 U. S. 200, 207-8; *Minn., St. Paul & S. S. M. Ry. Co.* v. *Popplar*, 237 U. S. 369, 372; *Texas & Pac. Ry. Co.* v. *Rigsby, supra; Oneida Community Ltd.* v. *Oneida Game Trap Co.*, 168 App. Div. 769, 774-8.

As to Respondent's "Point I" (Brief, pp. 5-8):

Petitioner does not seek to have a state court direct or control "a governmental function". It seeks only to prevent an injury to Petitioner's vested rights through an open violation of a mandatory, ministerial duty which does not involve a governmental function in the sense of an exercise of discretion or of the political or sovereign power. (*Kendall* case (1838), 12 Pet. 610, 614.) (Petition for Certiorari, pp. 14; Supporting Brief, pp. 44, 45.) The *McClung* case, again urged by Respondent as conclusive, is demonstrably destroyed as authority by the reasoning of Judge Conway in his dissent (286 N. Y. at 514, *et seq.;* R. 42, *et seq.*). Respondent declares: "No case has been cited by the petitioner in any of the courts during any stage of this proceeding which disputed its authority (*McClung* case)." As has been pointed out several cases completely dissipate that claim, i. e., *Northern Pacific Ry. Co. & Walker D. Hines as Director General of Railroads* v. *North Dakota,* 250 U. S. 135, 152; *Claflin* v. *Houseman,* 93 U. S. 130, 137; *Second Employers Liability Cases,* 223 U. S. 1, 57, 58; *Houston* v. *Moore,* 5 Wheat. 1; *Riggs* v. *Johnson County,* 6 Wall. 166.

This Court, following the *Kendall* case, held in *United States* v. *Schurz* (1880), 102 U. S. 378, 393-395, that the Supreme Court of the District of Columbia could compel by mandamus the Secretary of the Treasury, the then head of the Government Land Department, to issue and deliver a land patent to the petitioner, on the ground that all matters involving judgment and discretion had already been passed upon favorably to petitioner by the proper land officers and that only the ministerial act of issuing and delivering the patent, enjoined upon him by law, remained to be done. That case definitely holds that the Supreme Court of the District of Columbia possesses jurisdiction to issue writs of mandamus "in cases in which the parties by the common law are entitled to them", to compel even the head of the

United States Land Department, in connection with his "governmental function" of supervising the Land Department and issuing patents under the Public Land Acts, to perform a *ministerial* statutory duty. Since the *Schurz* case, the heads of the Land Department and land officers have been subject to mandamus in the District of Columbia Courts, to compel them to perform ministerial acts enjoined upon them by the Public Land Laws (*Wilbur* v. *Krushnic,* 280 U. S. 305, 318-319).

Viewed restrospectively from the *Kendall, Schurz, Claflin* and *Northern Pacific* decisions the Ohio court clearly had jurisdiction to issue mandamus to compel the register to make the entry, if the land had not theretofore passed out of the public domain (*Payne* v. *Central Pacific Ry. Co.,* 255 U. S. 228 at pages 237-8), as otherwise the act of May 10, 1800 (2 Stat. 73), would have been applicable; and, so, in any event, the Ohio and this Court had jurisdiction to pass upon the merits of McClung's claim.

Respondent's cases are not in point, hold no such rule as claimed and the text books cited merely repeat without analysis of the decision the mistaken and unwarranted headnote of the *McClung* case stating that: "A State Court cannot issue a mandamus to an officer of the United States."

Speaking of the *McClung* case and its citations on page 6 of Respondent's Brief, it is well to remind this Court that expressions in an opinion which are beyond the point involved do not come within the rule of *stare decisis.* (Marshall, Ch. J., in *Cohens* v. *Virginia,* 6 Wheat. 399; *Carroll* v. *Lessee of Carroll,* 16 How. 275, 286-7; *O'Donoghue* v. *U. S.,* 289 U. S. 516, 550; *Humphrey's Ex'r.* v. *U. S.,* 295 U. S. 602, 626-628; Hughes, Ch. J., in *Puerto Rico* v. *Shell Co.,* 302 U. S. 253, 269-270.) Nor is the original *dictum* converted into an authority by later quotation or citation, or misunderstanding of the holding by text book writers.

Respondent's claim rests upon pure assumption that its statutory duties involve a political or sovereign act and "are not ministerial but require the exercise of judgment, discretion and special knowledge", although the prescribed duty is

merely to certify the buying rates made by the New York market itself, with all transactions reported daily to Respondent. Respondent asserts: "With the ever-increasing number of activities of the Federal Government, with the increase of its departments, bureaus and administrative agencies, utter confusion would result if every State court in the land could undertake to mandamus Federal officials in the performance of their duties" (Respondent's Brief, pp. 7, 8). This is of course an unwarranted plea for autocratic and arbitrary power (*Garfield* v. *Goldsby,* 211 U. S. 249, 262), leading to such an unmitigated abuse as is presented by the Petition for mandamus, which remedy alone can prevent the Respondent's continuing unlawful disobedience of the Tariff Act and bring about a performance of its statutory mandatory and ministerial duties. Where concurrent jurisdiction of the state court is held to exist, the state court is barred from declining such jurisdiction on grounds of expediency (*Claflin* v. *Houseman*, 93 U. S. 130, 137; *Second Employers Liability Cases,* 223 U. S. 1, 57-58). It is also within the power of Congress to withdraw such concurrent jurisdiction at any time it sees fit, and respondent is protected from error by the right to the very writ of certiorari that it is now opposing.

As to Respondent's "Point II" (Brief, pp. 8, 9):

Not only is there no exclusive jurisdiction in the Customs Courts but there is no power in them either to bring in Respondent as a party or to render an enforceable judgment against it. (See Petitioner's Petition and Brief, pp. 22-24, 47-49.) Within the rules relative to mandamus and the New York Civil Practice Act, Respondent's unlawful acts cannot "be adequately reviewed by some other court, body or officer".

As to Respondent's "Point III" (Brief, pp. 9, 10):

Respondent states, on page 9 of its Brief, that "They (the Customs Courts) are expressly given jurisdiction to review

the validity of any orders or findings entering into the assessment of customs duties."

Section 522(c) touched at no point the jurisdiction of the Collector or the Customs Courts. It provided merely for the precedent certification of an official conversion rate that the Collector was by statute required to use in assessing and liquidating the duty. This official rate was not a "finding" entering into the Collector's decision, that either he or the Customs Courts had power to review under Section 514. The Collector was not invested with power to make independent decisions where his duty to use the certified conversion rate was mandatory. The Customs Court itself has decided: "The Collector of Customs has no discretion but to comply, and he therefore has made no decision from which an appeal to this Court will lie." (*Nahrgang* v. *United States,* T. D. 47, 134 [vol. 65, No. 26, pp. 23, 28].)

The assertion "that a determination by an executive agency of the rate of exchange entering into a customs assessment is a matter that * * * is nonjusticiable in any court" is unsupported by Respondent's cases. They hold that the decisions of foreign currency values committed to, and made by, our consular agents in their respective foreign countries were not subject to judicial review on collateral attack since the duty of valuation was by statute left to their unfettered judgment and discretion. The doubts, delays and unfairness engendered by that system led to the change made by the enactment of Section 522(c) calling simply for the reporting of the rates determined by the market action itself.

The Respondent's cases cited on page 9 are not in point. In all of them, under the prior acts, the determination of the "value" of the foreign currency was delegated to the unfettered discretion of the consular officers or of the Director of the Mint. No such unfettered delegation of discretion was made by the new Section 522(c).

Section 522(c) appeared first as Section 403 of the Emergency Tariff Act of May 12, 1921 (42 Stat. 17). That Section was substantially in the form of the present Section

522(c). It was intended completely to eliminate all functions involving judgment and discretion existing in the prior acts, under which the *Cramer, Hadden, Klingenberg* and *Amalgamated Textiles* cases were decided, by restricting the inquiry to the New York market rate for cable transfers. This conclusion is confirmed by the Report of the Senate Committee on Finance on Section 403 of the Emergency Tariff Bill (Senate Report No. 16, 67th Cong. 1st Session, p. 16), which stated:

> "The present system requires the ascertainment of the value of foreign currency values thousands of miles away from the port of entry. The proposed amendment would permit the ascertainment of the value of foreign currency in the United States, *at which point it is readily ascertainable with a greater degree of accuracy.* * * *" (Italics supplied.)

Congress intended to eliminate all functions involving judgment and discretion by restricting the inquiry to the New York market buying rate for cable transfers. A "positive and peremptory rule of valuation" was prescribed such as "would enable a court to correct an alleged mistake or miscalculation." (*Hadden* v. *Merritt,* 115 U. S. 25, 28.)

As to Respondent's "Point IV" (Brief, pp. 10-13):

No repetitious, ambiguous talk concerning "governmental function" can prevail against the rights vested in Petitioner by Section 522(c) of the Tariff Act of 1930, or lawfully warrant or authorize the illegal rate certified by Respondent, the use of which, when certified, becomes mandatory upon the customs authorities, resulting in the imposition upon Petitioner of a grossly swollen tariff duty. (Tariff Act of 1930, Section 1; Title 19, U. S. C. A., Section 1001; *Macy* v. *Browne,* 224 Fed. 359, 361, 362, aff'd *sub nom. Waite* v. *Macy,* 246 U. S. 606, 608-610; *Morrison* v. *Work,* 266 U. S. 481, 486-7, and cases cited; *Philadelphia* v. *Stimson,* 223 U. S. 605, 619, 620, and cases cited; *Payne* v. *Central Pacific Ry. Co.,* 255 U. S. 228, 236, 238.)

The real issue involved is confused by Respondent's assumption that the duty imposed constitutes a "governmental function", although Respondent's prescribed duty is not such a function (*Kendall* v. *United States,* 12 Peters 524, 610; *United States* v. *Wilbur,* 281 U. S. 206). The statute should not be interpreted "to make its grant illusory" (*Robia Holding Corp.* v. *Walker,* 257 N. Y. 431, 439, by Lehman, C. J.; *Dudley* v. *Mayhew,* 3 N. Y. 9, 15). Relief, of course, may be accorded against the wrongful exercise of governmental power (*Northern Pac. Ry. Co.* v. *North Dakota,* 250 U. S. 135; *Claflin* v. *Houseman,* 93 U. S. 130; *Teal* v. *Felton,* 12 How. 284, aff'g 1 N. Y. 537; *Riggs* v. *Johnson County,* 6 Wall. 166; Petition and Petitioner's Brief, pp. 14-18, 23, 40-42, 46). Respondent wholly failed to perform its prescribed statutory duty and, therefore, in so departing from the statute, it ceases to be an agency of the federal government and is entitled to protection only when its act is "within its authority as a Federal instrumentality". The Tariff Act prescribes the "manner of performance" of Respondent's duty and Respondent's open violation of its prescribed duty is not the performance of a federal or governmental function. *Wilbur* v. *Krushnic,* 280 U. S. 305, 318-319. It is the common jurisdiction and duty both of the federal and state courts "to prevent Federal officers or agents from going outside their Federal statutory authority and jurisdiction" (Respondent's Brief, p. 11; *Northern Pac. Ry. Co.* v. *North Dakota,* 250 U. S. 135, 152; Petition and Brief of Petitioner, pp. 14, 15, 20, 40-47).

At page 12 of its brief, Respondent states:

> "* * * any order of the State Court directing Respondent *nunc pro tunc* to certify new and different rates for Brazilian milreis on the dates in question and therefore disregarding or annulling the action already taken by Respondent in discharge of its statutory duty, would clearly constitute a direction of the manner of performance of that duty."

This was precisely what this Court ordered done in *Garfield* v. *Goldsby,* 211 U. S. 249, 255, 258, 261, 262, 264, and also was done in *Bates* v. *Supervisors,* 138 N. Y. 95, 115. In *Waite* v. *Macy,* 246 U. S. 606, the injunction against the contemplated violation of the plaintiff's vested rights under the Tea Act was ordered directed to the defendants "individually and as members of the Tea Board," and in the New York case of *Matter of Lewis* v. *Carter,* 220 N. Y. 8, 18, mandamus was directed to the defendants "individually and as the Board of Parole for State Prisons."

Respondent urges (Brief, p. 13) that the federal statutory power given it "to sue and be sued in any courts" gives to New York courts jurisdiction only over the person and not otherwise. "It does not, however, invest such courts with jurisdiction over an action or proceeding against the Federal Reserve Bank of New York involving a *subject matter* which is not within their jurisdiction." This necessarily is an admission by Respondent that there is a federal rule involved and that the denial of a remedy to Petitioner for deprivation of its rights and immunities under the Tariff Act of 1930 because of the claimed withdrawal from the state of any judicial power as against a federal agency, due to the federal constitution and this Court's decision in the *McClung* case, necessarily raises a federal question within this Court's jurisdiction. What this Court, in *F. H. A.* v. *Burr,* 309 U. S. 242, 245, 246, 249, has held to be meant by the authorization by Congress to a federal governmental agency "to sue and be sued" is, that Congress intended to withdraw from its governmental agent any immunity from suit in a state court and to subject it to all state civil process that did not in truth deprive it of power to serve the federal government as it was intended to serve it, or hinder the efficient exercise of its power; and that the burden was on the federal agent clearly to show that such results would flow from being subjected to such state civil process. The Respondent for obvious reasons has not attempted to show this.

As to the Separate "Memorandum for the United States, Amicus Curiae"

The Government's citations (pp. 7-9) and the Respondent's, at pages 6 and 7 of its Brief, do not support their claims that "this Court early held that state courts are without power to mandamus a federal officer". *McClung* v. *Silliman* has been disposed of. In *In re Blake,* 175 U. S. 114, and *Territory* v. *Lockwood,* 3 Wall. 236, the point was not involved and the citation of *McClung* v. *Silliman* was purely *obiter*. *Goldstein* v. *Somervell,* 170 Misc. 602, and *United States* v. *Owlett,* 15 F. Supp. 736, were clear cases of attempted grave interference with the legitimate functioning of a Federal Administrative Agency, which would necessarily impair its ability to function. *Ex parte Shockley,* 17 F. (2d) 133, merely held that a state court had no power or jurisdiction to control by mandamus the official *discretion* of an officer or agent of the United States in the performance of a duty vested in him by a law of the United States, or to order him to perform a duty not vested in him by any law (pp. 136-7). In *Hinkle* v. *Franklin,* 118 W. Va. 5, the West Virginia court evidently followed the erroneous syllabus in *McClung,* that a state court could not control by mandamus an officer of the United States in the performance of his "official" duty, citing also *In re Shockley, supra.* As the "official" act sought to be mandamused in the *Hinkle* case involved discretion and in the *McClung* case involved a *ministerial* act (Section 7, Act of May 10, 1800, 2 Stat. 73; Respondent's Brief, p. 7) we object, not to the *Hinkle* decision, but to the irrelevant citation of *McClung.* While the cited *Shockley* decision that an official act of a federal officer involving discretion could not be controlled by mandamus in a State Court action was partly pertinent, this would be equally true of an action in the Supreme Court of the District of Columbia. The citation is, therefore, not in point to differentiate state from federal courts. *Wilbur* v. *United States,* 281 U. S. 206, 218, 219, lays down the true rule: (1) that mandamus is employed to compel performance of

a ministerial act, this being its chief use, and also to *compel action* in matters involving judgment and discretion, but not to direct the exercise of *judgment or discretion* in a particular way; and (2) that when the duty of the Secretary of the Interior or other executive officer, in the administration of the statutes, is, in a particular situation, so plainly prescribed as to be free from doubt and equivalent to a positive command, it is regarded as so far ministerial that the performance may be compelled by mandamus.

No one of the Respondent's or the Government's cases was, like the instant case, an attempt to require a federal agent to comply with the federal statutory command. They are not in point here where the Petitioner is seeking relief in aid of, rather than interfering with, the federal authority. *Trable's Case,* 13 Wall. 397, is clearly distinguishable. It was not an attempt to compel the federal officer to perform duties imposed on him by a federal statute, but an attempt of a state court by *habeas corpus* to interfere with, and nullify his acting legally within his jurisdiction,—just the opposite to the instant case. *Claflin* v. *Houseman,* 93 U. S. 130, 136-143, with its concurrent jurisdiction successors (Petition, p. 15; Brief, p. 41) completely overrules the *ratio decidendi* of the *Tarble* opinion, which latter was based on the now rejected doctrine of warring sovereignties between the federal and state courts.

The Government seeks to dispose of cases, such as *Riggs* v. *Johnson County,* 6 Wall. 166 (Memorandum, p. 11), on the theory that the so-called Process Acts are statutory authority for "* * * federal courts, in conformity with state practice, to compel state officers to levy taxes to pay federal judgments * * *." It is clear that the federal courts, except in the District of Columbia, have no original jurisdiction in mandamus but the power to issue that writ is purely ancillary, having first otherwise acquired jurisdiction. The Process Acts simply confirm this purely ancillary jurisdiction. However the exercise of this power to issue mandamus as against state officers or agents is wholly dependent upon a grant by the state statute of that remedy.

Thus, whether the mandamus proceeds from original or ancillary jurisdiction makes no difference, for the enforcement of state laws by federal mandamus against state agents, destroys the sole reason for the claimed effect of the *McClung* case, i. e., that the official conduct of an officer or agent of the United States Government "can only be controlled by the power that created him" (R. 28; 6 Wheat. at 605). This exercise by federal courts of mandamus power over state agents necessarily destroys the sole reason given by Johnson, J., in his *McClung* opinion, as well as the Government's claim of the case as an authority (Petitioner's Brief, pp. 46, 47; dissent of Conway, J., 286 N. Y. at 522-3, R. 49, 50). If Congress can invest its District Courts in a State with the State's execution or enforcement processes of a judgment, we fail to see why a State Court, having concurrent jurisdiction of a subject matter with the federal courts, may not also use its statutory process of mandamus to enforce rights of its citizens created under an act of Congress that leaves the remedy to the State Courts, in aid of such Congressional act.

In the very recent case of *Brooks* v. *Dewar,* 313 U. S. 354, 360, 361 (where the Government cited cases, not from the decision of the court, but from the brief of the petitioner, in that case the federal officer), this Court, citing *Cunningham* v. *Macon & Brunswick R. Co.,* (1883) 109 U. S. 446, 451, said, on writ of error to the Nevada Supreme Court, at pp. 359-360:

> "We are not disposed to attempt a critique of the authorities. *Since the jurisdiction and the procedure of the court below* (granting an injunction against the federal officer) *is sustained by decisions of this Court,* we are unwilling to base our judgment upon a resolution of asserted conflict touching issues of so grave consequence, *where, as here, the bill fails to make a case upon the merits.*" (Italics ours.)

As this Court there found that Congress had ratified the acts of the federal officers, it reversed on the merits, but asserted that the state court had jurisdiction.

The Court in *Cunningham* v. *Macon & Brunswick Railroad Company, supra,* to which this Court referred in its opinion, in a review of suits brought against federal officers, divided them into three classes (pp. 452, 453), the third of which classes it described as follows:

> "3. A third class, which has given rise to more controversy, is where the law has imposed upon an officer of the government a well defined duty in regard to a specific matter, not affecting the general powers or functions of the government, but in the performance of which one or more individuals have a distinct interest capable of enforcement by judicial process.
>
> "Of this class are writs of mandamus to public officers, as in *Marbury* v. *Madison,* 1 Cranch, 137; *Kendall* v. *Stokes,* 3 How. 87; *United States* v. *Schurtz,* 102 U. S. 378; *United States* v. *Boutwell,* 17 Wall. 604."

This Court there destroyed the entire thesis of the Respondent and the Government that there is an essential difference between mandamus and the remedy of damages for tort against a federal officer unlawfully injurying property of the petitioner under color of authority. (See: Respondent's Brief, p. 11; Government's Brief, pp. 9-10; and much more fully in their briefs below in the New York Court of Appeals). Mr. Justice Miller, writing for this Court, said, at page 456 (of 109 U. S.):

> "In actions at law, of which mandamus is one, where an individual is sued, as for injuries to person or to property, real or personal, *or in regard to a duty which he is personally bound to perform,* the government does not stand behind him to defend him. If he has the authority of law to sustain him in what he has done, like any other defendant, he must show it to the court and abide the result. * * * It is no answer for the defendant to say I am an officer of the government and acted under its authority, unless he shows the sufficiency of that authority." (Italics Supplied.)

The United States, at page 7 of its Brief, *Amicus Curiae,* says: "* * * the rule of the *McClung* case is not based on the government's immunity from suit but on the principle that the conduct of a federal officer 'can only be controlled by the power that created him.'" Of course, no provision of the Federal Constitution expressly or impliedly grants immunity to a federal agent from state court action based on his unlawful acts under color of authority. This *dictum* of Mr. Justice Johnson in the *McClung* case (which was *obiter* since the court had no appellate jurisdiction of the point involved; Petition, p. 19; Supporting Brief, *Point Third,* pp. 51-55) but which the Respondent and the Government seek to apply as a basic "principle" of constitutional law modifying the conceded concurrent jurisdiction of the Federal and State courts, itself stemmed from the now long-abandoned concept of mandamus as a prerogative writ of the sovereign (*United States* v. *Kendall* (1838), 12 Pet. 524, 620-621; *Hartman* v. *Greenhow,* 102 U. S. 672, 675; *People, ex rel. Solomon* v. *Brotherhood of Painters,* 218 N. Y. 115; Petition, p. 21). Mandamus, or a statutory order of that nature, today "is nothing more than an ordinary proceeding or action in which the performance of a specific duty, by which the rights of the petitioner are affected, is sought to be enforced" (*Hartman* v. *Greenhow, supra,* p. 675). The *dictum* further stems from the earlier legalistic concept of the States and the Federal Government as independent sovereignties with warring jurisdictions, portrayed in *Tarble's Case* and sought to be imposed on this Court in the *Claflin* case, but which this Court there definitely rejected (93 U. S. 130, 137-143). The *Claflin, Bombolis, Taylor* and *Second Employers' Liability* cases (Petition, p. 15; Brief, p. 41) definitely put a quietus on the false assumptions upon which Justice Johnson's *obiter dictum* in the *McClung* case was based.

The *Kendall* case (1838) is quoted from (Respondent's Brief, p. 7; Government's Amicus Memorandum, pp. 8, 9) for the claim that the only issue in the *McClung* case

(1821) was simply the power by a state court to mandamus a federal agent, and that this power was denied. Judge Conway (286 N. Y. at 514, et seq., R. 42, et seq.) demonstrates by his analysis of the *McClung* case that this simply could not be so and that the *Kendall* expression is a mistaken opinion (Petitioner's Brief, pp. 51-53). The quotation is pure *dictum* and its assertion in *Kendall,* of course, does not make it true. Mr. Justice Thompson in the *Kendall* case was evidently misled by the erroneous syllabus and by the expressions of Mr. Justice Johnson in the *McClung* opinion. This Court clearly never had appellate jurisdiction to pass upon the claimed immunity of Silliman, as a federal officer, from the process of the Ohio Court Mr. Justice Johnson admitted this (page 603 of 6 Wheat.), but with his eyes wide open to this Court's lack of appellate jurisdiction of that issue on writ of error, sought to force a general appellate jurisdiction by saying that the court:

> "* * * is not bound to encounter phantoms. * * * And notwithstanding express evidence of the contrary, this court feels itself sanctioned, in referring the decision of the state court, in this case, to the ground on which it ought to have been made, instead of that on which it appears to have been made. The question before an appellate court is, was the judgment correct, not the ground on which the judgment professes to proceed" (6 Wheat. at 603).

This statement may be true of appellate courts with plenary jurisdiction of all issues, but was emphatically not true under the strictly limited jurisdiction of this Court on writ of error under the 25th section of the Judiciary Act (*Crowell* v. *Randell* (1836), 10 Pet. 367, 392, *et seq.*). There Mr. Justice Story, writing for this Court, at page 392, pointed out that the appellate jurisdiction of this court fails unless it appears

> *"that the court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that (federal) question as indispensable to that judgment."*

And at page 395, Justice Story quoted from the opinion of Chief Justice Marshall in *Hickie* v. *Starke,* 1 Pet. 98:

> "In the construction of that section (the 25th) the court has never required that the treaty or act of congress, *under which the party claims, who brings the final judgment of a state court into review before this court,* should have been pleaded specially or spread on the record. *But it has always been deemed essential to the exercise of jurisdiction in such a case, that the record should show a complete title under the treaty or act of congress, and that the judgment of the court is in violation of that treaty."* (Italics supplied.)

In the *McClung* case the Public Land Acts were not applicable (*Payne* v. *Central Pacific Ry. Co.,* 255 U. S. 228, at pages 237-8; Petition, p. 19; Supporting Brief, pp. 53-54) and were not applied, and McClung showed no title or right of entry under them. The stipulated facts made the case identical with *Morrison* v. *Work,* 266 U. S. 481, 486, and *Brooks* v. *Dewar,* 313 U. S. 354, the first of which this court dismissed on the merits, as complainant had no standing to challenge the officer's acts, and the second, as no substantial federal question was necessarily involved.

Under the strictly limited appellate jurisdiction of this Court on writ of error under the 25th section of the Judiciary Act, this Court, on *McClung's* writ of error, had no appellate jurisdiction of the issue of the Register Silliman's immunity from process of the Ohio Court, because the judgment of the court below had been, not adverse to, as the statute required, but in favor of McClung on that issue; and this Court further had no appellate jurisdiction to pass on that issue in behalf of the Register Silliman, because Silliman had not sued out a writ of error, assigning as an error the Ohio Court's rejection of the claimed immunity (*Hickie* v. *Starke,* 1 Pet. 98; *Crowell* v. *Randell,* 10 Pet. 395).

Judge Conway in his dissent (286 N. Y. at 516) demonstrates by his quotation from the *Kendall* case (12 Peters, at 619) that, if M'Clung had been actually decided upon

the ground of lack of jurisdiction in the state court to issue mandamus to a federal officer as such, the judgment below would not have been affirmed by this Court, but would have been dismissed "for lack of jurisdiction":

> "As was aptly said in *Kendall* v. *United States* [12 Pet. (U. S.) at p. 619, referring to *Columbian Ins. Co.* v. *Wheelwright,* 7 Wheat. (U. S.) 524, 534]: 'If the want of jurisdiction in the circuit court had been the ground on which the writ of error was quashed, the same course would have been pursued as was done in the case of *Custiss* v. *Georgetown & Alexandria Turnpike Co.,* 6 Cranch, 233; where the writ of error was quashed on the ground that the court below had not cognizance of the matter.'"

See also: *Miller* v. *Nichols,* 4 Wheat. 311; *Williams* v. *Norris,* 12 Wheat. 117; *Hickie* v. *Starke,* 1 Pet. 98; *Fisher's Lessee* v. *Cockerell,* 5 Pet. 248; *Crowell* v. *Randell,* 10 Pet. 368.

As this Reply disposes of substantially all other points urged by the Government, the Petitioner feels it to be helpful to refer further to only the following:

The Government seeks to overcome the otherwise fatal decision in *North Dakota* v. *Northern Pacific Railway,* 250 U. S. 135, by urging:

> "The state court undoubtedly had jurisdiction to enforce the Director General's alleged duties under state law under the rule of *First National Bank* v. *Missouri,* supra (263 U. S. 640), quite apart from the express provision of Section 10 of the Federal Control Act that 'no defense shall be made * * * upon the ground that the carrier is an instrumentality or agency of the Federal Government'. Jurisdiction was apparently expressly conceded by all the parties in the state courts (see 250 U. S. at 142), and was not controverted in this Court by the appellants. * * *" (Government Memorandum, p. 10, footnote 5.)

This concession that a federal agent, to the extent that he may be burdened with duties under a state law, is sub-

ject to the enforcing jurisdiction of a state court, destroys any claim that the state court is deprived of power to issue mandamus.

The Government's quotation of Section 10 is only partial and any inference that this Court's decision as to jurisdiction is based upon this waiver is dissipated by repeating it in full as follows:

> "* * * Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government."

Quite apart from the issue whether the action was one against the United States, the brief filed in the *North Dakota* case (250 U. S. at 141) as Amicus Curiae by the several States and the National Association of Railway and Utilities Commissioners, called attention to this sentence and especially to the words *"as now provided by law"*, and urged that that provision of the act authorized the remedy of mandamus by a state court, citing and discussing at length, in support thereof, the cases of *Little* v. *Barreme*, 2 Cranch 170, *United States* v. *Lee*, 106 U. S. 196, 220-221, and *Second Employers' Liability Cases*, 223 U. S. 1, 55-59. The *Second Employers' Liability Cases* (1912), following *Claflin* v. *Houseman* (93 U. S. 130, 137, *et seq.*), reaffirmed the doctrine that rights arising under an act of Congress, in the absence of Congressional exclusion, may be enforced as of right in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion; and that state courts cannot refuse to enforce such rights by their common-law or statutory remedies, on the ground of possible inconvenience or confusion.

As jurisdiction can not be created by consent (*Neirbo* v. *Bethlehem Corp.*, 308 U. S. 165, 167), but results from the allegations of the complaint (*United States* v. *Lee*, 166 U. S. 196, 219-20) and of course precedes a determination

on the merits (*Minnesota* v. *Hitchcock,* 202 U. S. 68), it was imperative that this Court, in order to have jurisdiction to reverse on the merits the mandamus issued by the North Dakota Court, should first hold that the North Dakota Court, on the allegations of its complaint, had jurisdiction to issue mandamus to the Director of Railways; otherwise this Court would have had no power to reverse in that case. This Court did so hold, evidently adopting the contentions set out in the brief filed as Amicus Curiae by the several States and following its prior decisions in *Claflin* v. *Houseman* and *Second Employer's Liability Cases.* Mr. Chief Justice White, writing for the Court, said at page 152:

> "The relief afforded against the officer proceeded upon the basis that he was exerting a power not conferred by the statute, to the detriment of the rights and duties of the state authority, and was subject therefore to be restrained by state power within the limits of the statute. Upon the premise upon which it rests, that is, the unlawful acts of the officers, the proposition is undoubted * * *."

Having necessarily found that the state court had such jurisdiction, this Court held that it also had jurisdiction, on writ of error, to construe the act and reverse upon the merits for an erroneous construction of the act. It then reversed and "remanded for further proceedings not inconsistent with this opinion." No inference may, therefore, be drawn that jurisdiction was assumed in the *North Dakota* case because the statute removed the defense of federal instrumentality or agency.

Whatever may have been the holding, on the stipulated facts, in the *McClung* case in 1821, it is clear that this Court some one hundred years later in the *Northern Pacific* case advisedly applied its later fully developed doctrine of the concurrent jurisdiction of State Courts to protect by their local process rights created by Acts of Congress, to cover the issuance of mandamus by a state court to

compel the performance by a federal officer of a federal ministerial duty, upon the performance of which private rights were dependent. Even assuming, *arguendo,* Respondent's claimed holding of the *McClung* case to be correct, such putative holding was definitely rejected and overruled by this Court in the *Northern Pacific* case in 1918, as it had been forty-five years earlier in the *Claflin* case. (*Schmoll* v. *Federal Reserve Bank,* 286 N. Y. 513, dissent of Conway, J., at pp. 518, 519, 521, 522; R. (fol. 53) 45-46, 48-49).

Conclusion

It is respectfully submitted that it has clearly been shown that this Court has jurisdiction to review the decision of the New York Court of Appeals in this case, and that the decision of the Courts below is clearly not in accord with the applicable decisions of this Court; and that the Petitioner's Petition for Certiorari should be allowed and the Writ of Certiorari granted.

Respectfully submitted,

HERSEY EGGINTON,
Counsel for Petitioner.

HERSEY EGGINTON,
GEORGE D. MUMFORD,
of Counsel.